125-361

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TRANSCRIPT AS STIPULATED.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 126.

RUSSELL SAGE, APPELLANT,

vs.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (AS REORGANIZED).

PHILADELPHIA BAR ASSOCIATION

No. 127.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (AS REORGANIZED), APPELLANT,

vs.

RUSSELL SAGE.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED OCTOBER 18, 1884.

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1 STATE OF ARKANSAS, *County of Pulaski:*

In the Pulaski Chancery Court.

Be it remembered that at term of the Pulaski chancery court, begun and held at the city of Little Rock, the seat of government of the State of Arkansas, on the third Monday in September, A. D. 1882—present, the Honorable D. W. Carroll, chancellor, presiding—among others the following proceedings were had in said court on the 10th day of November, A. D. 1882, a day of said term, to wit:

2 STATE OF ARKANSAS:

In the Pulaski Chancery Court.

RUSSELL SAGE, Plaintiff,
vs.
THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY, as Reorganized, Defendant. } 1565.

Be it remembered that at a term of the Pulaski chancery court, begun and held at Little Rock, the seat of government of the State Arkansas, on the first Monday in March, A. D. 1882—present, the Hon. D. W. Carroll, chancellor, presiding—among others the following proceedings were had in said court on the 24th day of June, 1882, a day of said term, to wit:

RUSSELL SAGE, Plaintiff,
vs.
MEMPHIS & LITTLE ROCK RAILROAD COMPANY, as Reorganized, Defendant.

On this day came the plaintiff, by S. R. Cockrill, and the defendant, by B. C. Brown, and the plaintiff presents to the court his complaint in equity praying the appointment of a receiver to take possession of and operate the railroad and other property of defendant, and defendant, waiving notice, said complaint is heard, and the court being of opinion that such receiver is necessary to protect plaintiff's interests and rights, it is ordered that E. K. Sibley be, and he is hereby, appointed the receiver of this court, and as such is ordered and directed, first being sworn and giving bond in the sum of fifty thousand dollars, payable to the clerk of this court, with security to be approved by this court, to take possession of the Memphis and Little Rock Railroad in and through its whole length, together with its inclines, connections, tracks, depots, rolling stock, books, papers, and all and singular, its property of every kind, character, and description, and to operate the same.

And thereupon comes the said E. K. Sibley, and, being sworn in open court, upon his oath declares that he will faithfully discharge and perform his duties as such receiver, and will in all things obey the orders of this court in that behalf, and also presents to the court here his bond in the sum of fifty thousand dollars, payable to J. W. Callaway, as clerk of this court, and to his successors in office, with William Black, John D. Adams and Dean Adams as securities, which is approved by the court and filed.

It is therefore ordered that the defendant at once surrender possession of its said railroad, rolling stock, and all other property of every character to said receiver, and that the said receiver
3 operate the same as a railroad, in the usual manner, in its proper business of carriage of freights, express matter, and passengers; that he keep account of all receipts and expenses and make report thereof and of all his acts and doings to this court, as may be by order required.

And it is further ordered that as soon as may be the said receiver do make and file with the clerk of this court a true, full, and complete inventory of all and singular the property of said company—real, personal, and mixed—which has or may come into his hands, possession, or control as receiver in this cause.

And it is further ordered that said receiver shall continue the operation of the railroad in the ordinary and usual course, as the same is now operated, in the common carriage of freight and passengers, having due regard to the public interest and accommodation of the public, and keeping the premises and property, both real and personal, in good condition and repair, to the end that the said road may be efficiently operated with safety and convenience to the public. To the same end he shall from time to time employ and discharge all needful laborers, servants, and agents, and shall purchase and pay for all needful materials and supplies as may seem to him to be necessary and proper in the exercise of a sound discretion, and he shall have power to settle and adjust, according to the usual course of business, all outstanding traffic balances with other railroads, steamboats and telegraph companies, and to settle and adjust such like balance as may hereafter from time to time arise; and he shall have power to make and abrogate all usual and necessary and proper arrangements for the interchange of business in the way of traffic, and to continue or abrogate existing arrangements of the like kind, and to continue existing or to make new and proper arrangements for the transfer of freight and passenger cars over and across the Mississippi river to and from Memphis, Tennessee, and generally to do and perform all things usual and proper according to the rules and usages of good railroad management to increase the business of the road and promote the convenience of the public.

And it is further ordered that said receiver shall have power, at his discretion, to prosecute and defend all existing actions by or against said company, and to pay or defray the usual and ordinary expenses incident thereto, and to commence and prosecute any action which, in the usual course of business, he may deem it necessary and proper to commence hereafter, either in the name of the said company or in his own name, as such receiver, as he may be advised; and to defend any and all suits that may hereafter be brought against said company or against himself, as receiver, by permission of this court, and to defray the necessary and proper expense of such proper prosecution and defense, including reasonable fees of counsel employed for the purposes, and may employ and retain the
4 same counsel heretofore acting for said railroad company; and may pay the same salaries which have been paid by de-

fendant or otherwise at his discretion. And he is also empowered to sue for, collect, receive, and receipt for all sums of money due or claimed by said company, and to especially receive and receipt for all moneys due from the government of the United States to said company, and to pay all expenses incurred in the adjustment and collection of such demands.

And he is authorized and empowered to collect or convert any of the notes, bonds, or other securities payable to said railroad company which may come into his hands and to pledge or hypothecate the same to secure payment of any moneys borrowed by him by leave of this court, to pay at his discretion all liens existing on the depots and depot buildings used about the business of said railroad in this State or Memphis, Tennessee, and to pay all due and unpaid purchase-money of locomotives or of other rolling stock used on said road if the same can be discharged out of the earnings of the road.

And he is further authorized to contract for, obtain, and use all rights of way over or across lands or other railways in this State or elsewhere which in his judgment are necessary for the due and profitable operation of said railroad, and to pay all sums of money necessary to obtain and operate the same.

And the said receiver is further directed to pay and discharge all debts due from the company to laborers, servants, agents, and employees of all kinds for services rendered in and about the conduct and management of the business of said company, and also to pay any debt of said company contracted for materials and supplies purchased for use of said company or its employees, and may issue certificates of indebtedness for any sum or sums of money which he is hereby authorized to pay.

And it is further ordered that said receiver, acting in good faith and with ordinary prudence and care in the management of said business, shall not be answerable in his individual right for any breach of any contract entered into by him as receiver or for any injury to any person or to any property of any person by any accident occurring in the management and operation of said railroad or its business or by or through the negligence or misconduct of any person employed by him; nor, acting in good faith and with ordinary prudence and care, shall he be liable for any default, theft, or embezzlement of any person employed by him.

And it being shown that some part of the property hereby placed in the hands of said receiver is situated in Memphis, Tennessee, and that in the conduct of the business of said company other portions of said property must be sent into the State of Tennessee, and that many sums of money must necessarily become due to said receiver from persons and corporate bodies doing business in said State of Tennessee, and that there is danger that the possession thereof by said receiver may be disturbed by many vexatious suits in the courts of said State, said receiver is hereby authorized and empowered should, in his judgment, necessity therefor arise, to apply by petition or bill to any court of Tennessee to be appointed the receiver of that court of all such property, with

leave, however, to pass all his accounts as receiver before this court.

But it appearing that some immediate present repairs of the roadbed and rolling stock are imperatively needed, and that such necessities are frequently occurring, said receiver is authorized and empowered to have such repairs made and to incur in doing so a debt of twenty-five thousand dollars, to be paid out of the future revenues of said road, which are hereby pledged for payment thereof.

And said receiver is further authorized to offer and pay a sufficient reward for the detection and conviction of all persons who have or hereafter may injure said railroad or interrupt or damage the trains thereon, and to employ counsel and prosecute such persons.

And said receiver has leave to apply to this court for further directions from time to time as he may be advised.

6 In the Pulaski Chancery Court.

RUSSELL SAGE, Plaintiff,

vs.

MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized, Def't.

The plaintiff, Russell Sage, states that he has heretofore obtained judgment in the United States circuit court for the eastern district of Arkansas against the defendant, The Memphis and Little Rock Railroad Company, as reorganized, in the sum of one hundred and twenty-five thousand nine hundred and twenty one $\frac{13}{100}$ dollars, together with costs of suit taxed at the sum of ——.

A certified copy of the record of said judgment is hereto attached, marked "Exhibit A," and made part hereof.

Plaintiff alleges that the whole visible and tangible property of the defendant consists of its railroad extending from its junction with the St. Louis, Iron Mountain and Southern railroad, near Baring Cross, in Pulaski county, Arkansas, through the counties of Pulaski, Lonoke, Prairie, Monroe, St. Francis, and Crittenden, to the Mississippi river, an inclined tract used to transfer the rolling stock of said company to a steamboat in said river for transportation to the city of Memphis, the said steamboat, called the Gen. Wm. O. Pierson, certain tracts of land and a depot in the city of Memphis, State of Tennessee, built and used under a contract with said city of Memphis, together with a number of locomotives, passenger, freight, and other cars and rolling stock and property as is usual in the management and operation of a railroad.

Plaintiff further states that on the first day of May, 1877, the defendant, by its deed of that date, mortgaged all of its said property to certain trustees therein named to secure payment of its
7 bonds to the amount of $250,000, which bonds, as is shown by said mortgage, mature in equal installments of $50,000 each on the first day of May in the years 1879, 1880, 1881, 1882, and 1883, respectively, as appears by a copy of said mortgage hereto at-

tached, marked "Exhibit B," and made part hereof; that four installments of said bonds are now due and unpaid, and that all are outstanding against said defendant.

Plaintiff further states that by deed dated May 2, 1877, defendant mortgaged all its property, rights, and franchises of every description to certain trustees therein named to secure the payment of its other bonds to the amount of $2,600,000, payable July 1, 1907, which bonds, after July 1, 1882, bear interest at the rate of eight per cent. per annum and have interest coupons attached thereto. A copy of said mortgage is hereto attached, marked "Exhibit C," and made part hereof. Plaintiff alleges that in both of said mortgages the said trustees are authorized and empowered to take possession of and sell all of said mortgaged property upon the non-payment of any of said bonds or interest when the same are due and unpaid, and that said mortgages are recorded in the office of the recorder of deeds and mortgages for each of the counties above named.

Plaintiff alleges that the aggregate amount of the bonds secured by the said mortgages exceeds the salable value of all the property and franchises of every description owned by said defendants, or at least greatly exceed the sum for which said property and franchises would sell under execution; and plaintiff alleges that he believes no bidders could be found at more than nominal amounts for said property by reason of the existence of said mortgages; that a large part of the bonds secured by the said first mortgage being due and unpaid the trustees named therein could and would interfere and prevent the sale under execution of any part of said property if plaintiff should attempt to enforce payment of his said judgment by
8 means thereof, and that for these reasons to sue out an execution on his said judgment would be to incur useless expense and delay, and would result in no benefit whatever to him. Plaintiff further alleges that if the property of said railroad is kept together and legitimately and carefully used and worked in the business of transporting persons and freight the same will produce a large income sufficient to pay the operating expenses and necessary repairs for carrying on such business, and in each year leave a large surplus to pay off and discharge plaintiff's debt; but this the defendant neglects and refuses to do; that such property can be made to yield such income only by keeping it together and working it as a unit in the proper transportation business of the defendant, and that to seize and sell the rolling stock of defendant or any material part of its property would destroy its power to produce the income aforesaid without materially benefiting plaintiff, and would greatly incommode the public by destroying the use of said road in the manner contemplated by the State in the grant of its charter.

Plaintiff further says that the defendant has hitherto failed and refused to apply its said surplus income to the payment of his debt, and, unless prevented, it will continue so to refuse, and will apply its said surplus to other uses, to plaintiff's irreparable injury and loss. Plaintiff says that he is remediless at law, and that his only remedy is in this court, which can, through its said receiver, take possession of and operate said railroad and in this manner seize

upon the only means in reach of the law of satisfying plaintiff's demand. Plaintiff alleges that he seeks said relief subject to all the rights and equities of the holders of said bonds or of their trustees.

Wherefore plaintiff prays that this court appoint a proper person receiver of said railroad and of all its property and privileges
9 and franchises of every kind, whether herein described or not; that said receiver, under instructions and reporting to this court, operate said railroad in the business of transportation for which it was constructed in the usual manner, and that after payment of expenses, repairs, and wages now due employees, the net earnings or surplus income be by the court applied to the payment of plaintiff's judgment, and for all other proper relief.

S. R. COCKRILL,
Sol. for Pl'ff.

STATE OF ARKANSAS, *County of Pulaski:*

I, S. R. Cockrill, state that I am attorney for plaintiff, who is absent from the State, and that the matters above set forth are true to the best of my knowledge and belief.

S. R. COCKRILL.

Subscribed and sworn to before me the 24th June, 1882.
J. W. CALLAWAY, *Clerk.*

10 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 10th day of April, anno Domini one thousand eight hundred and eighty-two, at the United States court-room, in the city of Little Rock, Arkansas—the Honorable Henry C. Caldwell, district judge, presiding and holding said court—the following proceedings were had, to wit, on June 24th, 1882:

RUSSELL SAGE
vs.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized. } 3111.

On this day comes plaintiff, by attorney, S. R. Cockrill, and also comes the defendant, by B. C. Brown, its attorney, and by leave of the court plaintiff files his complaint herein against defendant; and thereupon said B. C. Brown produces and files herein a certified copy of a resolution of the board of directors of defendant authorizing and directing him, as attorney for said company, to appear in any court of competent jurisdiction and confess judgment in favor of plaintiff against said company for the amount due upon two notes of defendant, described in the complaint, and interest thereon; and thereupon said B. C. Brown enters the appearance of said defendant herein, and said defendant, by its said attorney, confesses the matters

in said complaint alleged and consents that judgment be rendered against it herein for the sum of one hundred and twenty-five thousand nine hundred and twenty-one dollars and thirteen cents ($125,921.13); and it appearing to the court, as well from the promissory notes with complaint filed as from the said confession and consent, that the defendant is indebted to the plaintiff in the sum aforesaid, it is considered, ordered, and adjudged by the court
11 that the plaintiff do have and recover of and from the defendant the sum of one hundred and twenty-five thousand nine hundred and twenty-one dollars and thirteen cents ($125,921.13), together with his costs; for which let execution issue.

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office of the complaint and judgment in case of Russell Sage *v.* Memphis & Little Rock Railroad Co., as reorganized.

In witness whereof I have hereunto set my hand and the seal of said court this seventh day of October, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States of America the one hundred and seventh.

[SEAL.] RALPH L. GOODRICH, *Clerk.*

12 RUSSELL SAGE, Plaintiff,

vs.

MEMPHIS AND LITTLE ROCK R. R., as Reorganized, Defendant.

SATURDAY, *October 14th*, 1882.

Comes John L. Farwell, by U. M. & G. B. Rose, his solicitors, and files his petition to be made a party defendant herein.

13 In the Pulaski Chancery Court.

RUSSELL SAGE, Plaintiff,

vs.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized, Defendant.

Comes John L. Farwell and respectfully shows to the court that he is a stockholder of the defendant company, being the owner of 17½ shares of its capital stock, as evidenced by certificate numbered 235, and he asks leave to intervene in this suit as a party defendant, and that he may be allowed to file his answer and cross-complaint which he presents herewith, and he says that all the facts set forth therein are true.

U. M. & G. B. ROSE.

STATE OF NEW HAMPSHIRE, *County of Sullivan:*

On this day came before me, a notary public in and for said county, George N. Farwell, 2d, and, being by me duly sworn, made oath that he believes the statements in the foregoing petition to be true.

GEORGE N. FARWELL, 2D.

Sworn to and subscribed before me this day. Witness my hand and seal of office this 10th day of October, 1882.

ALBERT ROSSITER, [L. S.]
Notary Public.

14 In the Pulaski Chancery Court.

RUSSELL SAGE, Plaintiff,

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized, Defendant.

Comes John L. Farwell, defendant herein, and shows to the court that he is the owner of 17½ shares of the capital stock of the defendant railroad company, said shares being represented by certificates numbered 235 & 11, and for answer and cross-complaint herein he says it is true, as stated by the plaintiff in his complaint, that he recovered judgment in the United States circuit court for the eastern district of Arkansas against said railroad company as set forth; that said judgment was, however, rendered by confession of the railroad company and by mutual agreement between the plaintiff and defendant therein on the same day that the complaint asking for the same was filed. Said judgment was rendered on the 24th day of June, 1882, the same day on which the complaint was filed in this court in this cause, as will be seen by a transcript of said proceeding herewith filed as Exhibit A. During the year 1881 Jay Gould, Russell Sage, the plaintiff herein, and Henry G. Marquand, acting in concert, acquired a majority in value of the stock of said railroad company. On the 28th day of April, 1882, R. K. Dow, Watson Matthews, and Charles Moran brought a suit in the said circuit court of the United States to enforce a claim against the railroad of said company and its other property for money expended in paying off a lien against the same amounting to about the sum of two hundred and fifty thousand dollars.

15 Said last-named suit is now pending on the chancery side of the said United States circuit court.

Said confession of judgment was designed for no other purpose than as a preliminary step to the application to this court for a receiver herein in order to hinder the prosecution of the said suit of Dow, Matthews, and Moran and to enable the said Gould, Sage, and Marquand to depreciate the market value of the bonds issued by the company, of which many are outstanding, and to depreciate the stock thereof so as to enable them to buy up the same for their common benefit at low prices to the injury of the defendant filing this answer, as well as all other stockholders except themselves.

That the said Gould, Sage, and Marquand are all men of very great wealth, who are able to wait until stock thus temporarily depreciated by them shall rise in price again after they have secured all or nearly all that may be in the hands of others, and when it shall be to their interest to permit said stock to be unaffected by the cloud cast upon it by the fact that a receiver is in charge of the road and all the property of the company, which naturally produces the impression in the markets of the world that the defendant railroad company is insolvent and that its stock cannot be of any value.

In short, the defendant says that this suit is a sham, nothing save a mere financial expedient, with no other object than that of enabling said Gould, Sage, and Marquand to make a successful speculation in the stock and securities of the railroad company;

16 that in respect of the matters set up in the complaint herein there is no antagonism either of feeling or interest either between the said Sage or the said railroad company, but that they have caused this suit to be brought and maintained in collusion with each other for a common purpose, the said Gould, Sage, and Marquand having caused a board of directors to be elected for said company that are now acting in perfect subservience to their interest and demands alone; this suit was brought by the said Sage, and the appearance was entered by the company without process, and a receiver was appointed by consent, the attorney of the company acting with the attorney of the plaintiff in preparing the complaint and in taking the order for a receiver, as well as in entering said confession of judgment; the pretence that there is any real controversy between the said Sage and the said railroad company is false in every particular and is a fraudulent device by means of which said Sage and the said company, as controlled by the said Sage, Gould, and Marquand, seek to make this court the mere instrument for the selfish acquisition of money by them at the expense of this defendant and all other stockholders of the company except themselves, jointly and severally.

On information and belief this defendant charges that the said company does not owe the said Sage anything.

The pretence made in the complaint that the railroad company is insolvent is untrue.

17 The pretence that the necessity existed for the appointment of a receiver in this cause, even admitting the fact of the alleged debt to the plaintiff, is equally false in every particular.

The total amount of the annual earnings of the company are not less than seven hundred and fifty thousand dollars, and since the — day of March, 1882, the defendant has paid no interest on her bonded debt for the reason that a refusal to pay said interest as it accrued on the first day of July, 1882, would have the further effect to lessen the value of the stock and securities of the company and would tend to the selfish gain of the said Gould, Sage, and Marquand; so that there has been no reason why the said debt claimed to be due the said Sage, even if it existed, should not be readily paid out of said earnings, particularly as no valuable improvements

have been placed on the road, and defendant charges that there is now money enough on hand in the hands of the receiver to pay the amount of the alleged claim of said plaintiff, or there ought to be.

By like consent and collusion the said parties procured the appointment of the present receiver, who was at the time the general manager of the company, subject to the orders of the said board of directors.

Since said appointment several months have elapsed, yet no report has ever been made by said receiver nor has any steps been taken by the parties in the cause since said appointment was made, save to get an order to defend suits and to pay out costs.

Since said appointment a suit has been brought in the United States circuit court for the eastern district of Arkansas against said company, and when the officers of the law came to serve writs of
18 summons they were informed by the attorney of the company that there was no agent or officer of the company in this State upon whom process could be served, as all the officers of the company and all of its agents had resigned, and said agents had accepted new appointments under said receiver, which statement this defendant charges to be true. The object of this last proceeding was in strict keeping with the objects of the other acts, as above stated—to depreciate the securities and stocks of the company and thus enable the said Gould, Marquand, and Sage to buy them up at nominal prices. The effect of these proceedings has been already greatly to the damage of the stockholders, saving the said parties against whom these charges are made, as the said stocks and securities have been largely depreciated in the market thereby, and they still continue to decrease, and probably will do so as long as they can, through the instrumentality of fictitious legal proceedings, produce the impression that the company is hopelessly involved in difficulty and litigation.

The said receiver makes this a cross-complaint against the said Sage and said railroad company, and he asks that they be compelled to answer the same; that the said Sage be required to prove his demand against the said railroad company, if he claims that one really exists, and that this defendant may be allowed to contest the same and to show all the facts connected with the same; that upon its being shown by him that said debt claimed to be due from said company to said Sage is either fictitious or that it no longer exists he may be enjoined from all attempts to enforce his said judg-
19 ment against the company; that the said receiver be required to report what he has done under his said appointment, and that he be discharged; that the said railroad company be enjoined from all further efforts to depreciate the value of its own stock in the interest of the said Gould, Marquand, and Sage, or any other combination of stockholders, and for all other proper relief.

U. M. & G. B. ROSE.

STATE OF NEW HAMPSHIRE, *County of Sullivan:*

On this day came before me, a notary public of said county and State, George N. Farwell, 2d, and made oath that he believes the statements made in the foregoing answer and cross-complaint are true.

GEORGE N. FARWELL, 2D.

Sworn to and subscribed before me. Witness my hand and official seal on this 10th day of October, 1882.

ALBERT ROSSITER, [L. S.]
Notary Public.

Filed in open court October 14th, 1882.

J. W. CALLAWAY, *Clerk*,
By S. R. BROWN, *D. C.*

20 In the Pulaski Chancery Court.

RUSSELL SAGE, Plaintiff,

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized, Defendant.

I, George N. Farwell, 2d, being duly sworn, hereby depose and say that John L. Farwell, who seeks to intervene and defend in the above-entitled cause, is in Germany, and that I am his duly authorized agent and attorney-in-fact, and am empowered to bring and defend any suits in my judgment necessary to protect his interests.

GEORGE N. FARWELL, 2*d.*

STATE OF NEW HAMPSHIRE, *County of Sullivan:*

On this 10th day of October, 1882, the above-named George N. Farwell, 2d, personally appeared before me, a notary public in and for said county, and, being by me duly sworn, made oath that the statements made in the foregoing deposition are true.

Witness my hand and seal of office this 10th day of October, 1882.

ALBERT ROSSITER, [L. S.]
Notary Public.

[Endorsed:] Russell Sage *v.* M. & L. R. R. Co. Motion of Farwell to intervene. Answer & cross-bill.

21 RUSSELL SAGE

vs.

THE MEMPHIS & LITTLE ROCK RAILROAD, as Reorganized.

WEDNESDAY, *Nov'r 8th*, 1882.

Comes Jno. L. Farwell, by U. M. & G. B. Rose, his solicitors, and by leave of the court amends his petition heretofore filed herein by interlineation.

RUSSELL SAGE

vs.

THE MEMPHIS AND LITTLE ROCK RAILROAD, as Reorganized.

FRIDAY, *Nov'r 10th*, 1882.

On this day came the said plaintiff, by S. R. Cockrill, Jr., Esq., his solicitor, and also came said defendants by B. C. Brown, Esq., *his* solicitor, and by leave of the court files the report of the receiver in this cause and the affidavits of H. G. Fleming, F.
22 A. Marquand, E. K. Sibley, Russell Sage, Jno W. Goodwin, and B. C. Brown; and also came Jno. L. Farwell, by U. M. & G. B. Rose, his solicitors, and his petition to be made a party herein is submitted to the court, and pending the agreement herein comes Robert K. Dow and by leave of the court files here his petition to be made a party herein, and said Farwell and Dow file here at the same time their petition to remove this cause into the United States court for the eastern district of Arkansas, and also a bond, conditioned as required by law, which bond is approved. Thereupon also, afterwards, came said Memphis and Little Rock Railroad Company, as reorganized, and by leave of the court files here its petition and bond for the removal of this cause into said circuit court of the United States, which bond is approved.

In Pulaski Chancery Court.

RUSSELL SAGE

vs.

THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY, as Reorganized.

LITTLE ROCK, ARK'S, *Nov'r 1st*, 1882.

H. G. Fleming, being duly sworn, says that he is by profession a civil engineer, and that he has been engaged in the practice of that branch of engineering which pertains to the building, repairing, and operating of railroads for more than eleven years.

He further says that he was appointed chief engineer of the Memphis and Little Rock Railroad Company in the month of March, 1881, and continued to act as such until the appointment of the receiver in this cause, on June 24th, 1882, and that since that date he has continued to act as chief engineer for the receiver; that since his appointment, in March, 1881, he has been constantly engaged upon the railroad of the Memphis and Little Rock Railroad Co., and is familiar with its condition and knows its needs and requirements.

23 He says that the road was in bad condition when he first went upon it, in March, 1881, then and since requiring constant repairs to keep it so that trains could be run upon it with any degree of safety, and making the operation of the road much more costly than it would have been if the road had been in proper condition.

He further says that he has not been able to make the proper repairs to put the road in good and safe condition, because, as has been

always informed, the company had not the money necessary to buy the material absolutely needed.

He also says that of the division of the road between the Mississippi river and the St. Francis river, a distance of about 39.3 miles, the greater part is below the high-water mark of the former river; that from February to April, 1882, this portion of the road was submerged by an overflow, and that the damage thereby caused, together with that caused by want of needed repairs, has placed the road in such condition that without large and immediate expenditures it will be impossible to run trains upon it with safety.

At the request of the receiver he has made and hereto attaches a statement of material and repairs actually needed, with an approximate estimate of their cost, which statement he hereto appends as part of this affidavit.

H. G. FLEMING,
Eng. for the Receiver.

Sworn to and subscribed before me this Nov'r 2d, 1882.
J. W. CALLAWAY, *Clerk.*

Statement of Sundry Expenditures Necessary in Order to Place the Memphis and Little Rock Railroad in a Condition to be Operated Successfully, Safely, and Economically.

24 At terminal points.

Memphis, Tenn.:

To make secure privileges granted by the taxing district and obtain an extension of the privileges and the lease thereon; also repairs to property as structures there:

(1) Paving	$4,700 00
(2) Platform and depots	500 00
(3) Scale and scale track	1,500 00
(4) Filling in Happy Hollow, 3,000, @ 30 cents	900 00
(5) Extension of incline and connection therewith	9,500 00
(6) Passenger depot at C., O. & S. W. & M. & C. June., Memphis & Little Rock proportion	1,000 00
(7) Repairs of incline	800 00
Total	18,900 00

At Hopefield, Ark.:

(8) New round-house	1,500 00
(9) New wharf boat	15,000 00
(10) New section-house	650 00
(11) New inclines	1,500 00
(12) New warehouse	700 00
(13) ¾ mile new sidings	3,500 00
(14) Protection of river bank	5,000 00
Total	27,850 00

At Argenta, Ark.:	
(15) New round-house	1,500 00
(16) New car shed	1,500 00
(17) Transfer platform	250 00
(18) ½ mile new sidings	2,400 00
Total	5,650 00
At Little Rock, Ark.:	
(19) Transfer shed	200 00
At local stations between Hopefield & Argenta.	
Edmondson:	
(20) New section-house	650 00
(21) New depot	600 00
20-mile post:	
(22) New siding, 2,000 ft.	2,800 00
25-mile post:	
(23) New siding, 2,000 ft.	6,000 00
29-mile post:	
(24) New siding, 2,000 ft.	4,000 00
Black Fish:	
(25) Extension of siding, 1,000 ft.	1,900 00
Madison:	
(26) Extension of siding	500 00
(27) New water tank	1,500 00
Forest City:	
(28) To obtain proper yard, transfer, and depot facilities	5,000 00
Wheatley:	
(29) New passenger depot	1,000 00
(30) New siding and extension of old siding	1,800 00
Brinkley:	
(31) For proper yard, transfer, & depot facilities	1,500 00
Hazen:	
(32) New siding & extension of old siding	1,600 00
Prairie Center tank:	
(33) New water tank	1,500 00
Carlisle:	
(34) New siding and extension of old siding	2,000 00

26	Lonoke:		
	(35) New passenger depot		1,200 00
	Bayou Meto:		
	(36) New siding		3,300 00
	(37) New depot		600 00
	Galloway:		
	(38) New depot		1,000 00
	Total		$38,450 00
	Permanent way—Argenta to Hopefield.		
	(39) 55 miles steel rails & fastenings in track, at $5,750	$316,250	
	Credit by old iron	96,250	
	Probable net cost		220,000 00
	(40) 75,000 new cross-ties, @ 35c.		26,250 00
	(41) 45 miles gravel ballast in track, at $1,800		81,000 00
	(42) 600 acres clearing, @ $20		12,000 00
	(43) 50 miles track fencing, at $500		25,000 00
	(44) Earth-work raising & widening banks—Hopefield to Madison	75,000 c. yds.	
	L'Anguille	4,000 "	
	Brinkley to Cashe river	42,500 "	
	Total, @ 32 cts.	121,500	38,880 00
	(45) Burnt cane (35 M. P.):		
	Earth-work, 25,000 yds., @ 32c.	8,000 00	
	Clearing 10 acres, @ $32.50	325 00	
	Bridging 1,100 ft., @ $6	6,600 00	
			14,925 00
	(46) St. Francis river bridge:		
	New superstructure	25,000	
	New pier (west end)	5,000	
	Restoring old piers	10,000	
			40,000 00
27	(47) L'Anguille, earth-work filling, trestle, 20,000 yds., @ 30c., 6,000		6,000 00
	(48) Repairs of trestle bridges		10,000 00
	(49) Black Fish bayou, new bridge		2,500 00
	Total		$476,555 00
	(50) Repairs of section-houses		3,000 00

Recapitulation.

Memphis, Tenn.	18,900 00
Hopefield, Ark.	27,850 00
Argenta, Ark.	5,650 00
Little Rock, Ark.	200 00
Local stations between Hopefield & Argenta	38,450 00
Permanent way " " "	476,555 00
Repairs of section-houses	3,000 00
Total	$570,605 00

The above approximate estimate of the imperative needs of the Memphis and Little Rock railroad — safe, successful, and economical operations I consider well within bounds of its actual wants. In it no provision is made for raising the grade of the road-bed between Hopefield and Madison above the extreme high-water mark of the flood of March, 1882, and the estimate for protection of river bank at Hopefield is merely for protection of the immediate river frontage from ordinary wash and flood, and is entirely inadequate to proper protection of the terminal facilities there in use.

The record of the fifty-five miles of old iron which the steel mentioned would be expected to replace is a continuous record of broken rails and endless patch-work, and it is, in my opinion, utterly unfitted for the safe carriage of the traffic now passing over it and which it is expected to bear. The items in the above statement numbered 7, 9, 11, 12, 13, 14, 23, 39, 40, 42, 43, 44, 45, 46, 48, 49, and 50, and amounting in the aggregate of cost to the sum of $425,055, I
28 believe to be imperatively needed during the ensuing twelve months for the safe operation of the road. The remaining items, while not so directly connected with the safety of operation, I also consider imperatively needed for the successful and economical handling and carriage of its traffic—passenger and freight.

W. G. FLEMING,
Engineer for the Receiver.

U. S. Circuit Court for the Eastern District of Arkansas.

ROBERT K. DOW, WATSON MATTHEWS, CHARLES MORAN, *et al.*

vs.

THE MEMPHIS AND LITTLE ROCK RAILWAY COMPANY, as Reorganized.

SOUTHERN DISTRICT OF NEW YORK, *City and County of New York*, } ss.:

F. A. Marquand, being duly sworn, says that he is the president of the Memphis and Little Rock Railway Company, as reorganized, the defendant above named, and that he is familiar with the affairs of said company, and in particular with the facts relating to the claim made by Russell Sage against said company, upon which judgment was confessed by said company; that said claim is just and unpaid; that said company confessed judgment thereon be-

cause the claim was demanded and was just; that said company had filed a bill in chancery in the State of New York seeking
29 relief against an inequitable mortgage and bonds secured thereby; that certain holders of such bonds had brought actions at law on their coupons and threatened to bring still other similar actions; that the officers and directors of said company believed that execution in such suits would break up the business of the company, and deponent still and now believes that such would have been the effect; that in order to prevent the levy of such execution the defendant company consented to the appointment of a receiver until its bill aforesaid could be heard.

Deponent further says that it is not true that such action of defendant company was had to enable Jay Gould, Russell Sage, H. G. Marquand, or any other person or persons to speculate in the stocks or securities of said company, and that the allegations of the petition of one Farwell herein to the effect that such was the case are false.

F. A. MARQUAND.

Sworn to before me this 1st day of November.

MELVIN BROWN,
Notary Public.

Certificate filed in N. Y. Co.

30 STATE OF NEW YORK, } ss:
City and County of New York, }

I, William A. Butler, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that Melvin Brown has filed in the clerk's office of the county of New York a certified copy of his appointment as notary public for the county of Kings, with his autograph signature, and was, at the time of taking the annexed deposition, duly authorized to take the same, and that I am well acquainted with the handwriting of said notary public and verily believe that the signature to the annexed certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 1st day of Nov., 1882.

[SEAL.] WM. A. BUTLER.

Fled in open court November 10th, 1882.

J. W. CALLOWAY, *Clerk.*

Affidavit of Russell Sage, Plaintiff, Opposing the Motion of John L. Farwell for Leave to Intervene and File Answer and Cross-Complaint.

In the Pulaski Chancery Court.

RUSSELL SAGE

vs.

THE MEMPHIS & LITTLE ROCK RAILROAD CO., as Reorganized.

CITY AND COUNTY OF NEW YORK, *ss*:

Russell Sage, being duly sworn, says that he has read the
31 proposed answer and cross-complaint which accompany the motion of John L. Farwell filed herein and, in reply, affiant states—

First. He does not now own and believes he has never owned any share or shares whatever in the Memphis and Little Rock Railroad Company, as reorganized. Affiant is one of three trustees, to wit, Jay Gould, Henry G. Marquand, and himself, who hold in trust thirteen thousand nine hundred and seven and one-half shares of the capital stock of said company, but the affiant declares that the same is a naked trust, not coupled with any interest or ownership whatever either in himself or either of the other trustees above named. Affiant further states, on information and belief, that it is not contemplated by any one interested in or representing the said trust estate, by the acquisition of all or any part of the remainder of said capital stock, or to do any act for the benefit of the stock so held in trust as distinguished from the remainder of said stock.

Sec. Affiant further states that he is not now and believes he has never been the owner of any of the bonds of the Memphis and Little Rock Railroad Company (as reorganized).

Third. Affiant denies positively as to himself, and upon information and belief as to Jay Gould and Henry G. Marquand, each — all of the allegations of said bill of complaint touching the existence of any conspiracy between himself and the said Gould and Marquand or either of them or any purpose on the part of himself or either of them to depreciate the said capital stock or the said bonds or to buy in the same or any part thereof or to speculate in either or to make money in any way at the expense of the defendant railway company or its stockholders or to injure the said stockholders in any way whatever save as such injury may unavoidably result from the collection of the debt upon which this suit is brought.

On the contrary, affiant believes the bringing of this suit and
32 the appointment of a receiver herein, as has been done, to be for the best interest of all the shareholders of said defendant railway company and of the trust estate, comprising nearly the whole of said capital stock, which affiant represents.

Fourth. Affiant denies that this suit is a "sham," as alleged in the complaint, and denies, on information and belief, that the averment of the complaint that the defendant railway company is insolvent is untrue. On the contrary, affiant states that this suit is brought in good faith for the recovery of money actually loaned to the de-

fendant railway company to enable it to avoid default upon its mortgage bonds, and which was so loaned because, as affiant alleges upon information and belief, it was not possible for said railway company otherwise to avoid such default.

RUSSELL SAGE.

Sworn to before me this 27th day of October, 1882.

HERBERT E. DICKSON,
Notary Public (*No* 111), *City and County of New York.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, William A. Butler, clerk of the city and county of New York and also clerk of the supreme court for the city and county, the same being a court of record, do hereby certify that Herbert E. Dickson, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in the said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 27th day of October, 1882.

[SEAL.] WM. A. BUTLER, *Clerk.*

33 Filed in open court Nov. 10th, 1882.

J. W. CALLOWAY, *Clerk.*

In the Pulaski Chancery Court.

RUSSEL SAGE
vs.
THE MEMPHIS AND LITTLE ROCK RAILROAD CO., as Reorganized.

I, John W. Goodwin, state that I am the secretary of the Memphis and Little Rock Railroad Company, as organized, and am the keeper of its records and books, and that the stock books of said company show that on March 25th, 1880, John A. Bell transferred to John L. Farwell sixty-two and one-half (62½) shares of the capital stock of the said company; and on same day Ex. Norton transferred to said Farwell forty-six and one quarter shares of said capital stock, and John Haven transferred to said Farwell six and one-quarter shares of said stock, and on June 3rd, 1880, R. K. Dow transferred to said Farwell five shares of said capital stock, and on December 28th, 1880, R. K. Dow in trust transferred to said Farwell thirty shares of said capital stock, and that on the dates aforesaid said company issued to said Farwell its certificates of stock numbered 219, 220, 235, and 288; that on June 6th, 1880, the said Farwell transferred to H. G. Marquand one hundred shares of said stock, and on August 2, 1880, said Farwell transferred to said H. G. Marquand fifteen shares of said capital stock, and on January 27, 1881, said Farwell transferred to said H. G. Marquand thirty shares of said capital stock; that said transfers are all duly recorded in the stock book of the

said company; that Farwell appears on said book as the holder of five shares, evidenced by a certificate No. 235, and no more.

JNO. W. GOODWIN.

34 Sworn to and subscribed before me this 9th day of November, 1882.

GEO. E. DODGE,
Notary Public, Pulaski County.

Filed in open court Nov. 10th, 1882.

J. W. CALLOWAY, *Clerk.*

List of Stockholders in M. & L. R. R. Co. (as Reorganized) August 5th, 1882.

	No. shares.
Barlow, Chas.	12½
Black, Wm.	5
Beck, J. W.	5
Brown, B. C.	5
Borg, S.	5
Clark, C. H.	45
Crook, R. L.	71¼
Cossit, F. H.	60
Calef, A. H.	5
Day, Thos.	6¼
Dennis, J. W.	5
Dow, R. K.	21¼
Dow, R. K., ag't	10
Dow, R. K., trustee	227½
Dows, David	45
Essex, Thos.	3
35 Farwell, Jno. L.	5
Goodwyn, W. A.	6¼
Gould, J., R. Sage, & H. G. Marquand, trustees	6,382½
Harshman, Geo. W.	12¼
Hays, J. A., Jr.	6¼
Hayes, R. S.	2
Laguerenne, Mrs. Julia	12½
Watson Matthews & R. K. Dow, trustees	51¼
McWilliams, D. H.	5
Mills, D. H.	6¼
Massey, Wm. B.	6¼
Marquand, A.	5
Marquand, H. G.	7,500
Norton, Ex.	1¼
Patterson, P. M.	5
Parnell, C. S.	50
Sheldon, H. K.	395
Sibley, E. K.	5
Sheldon, H. K., trustee	6¼
Wynne, J. W.	5
	15,000

In Pulaski Chancery Court.

RUSSELL SAGE
vs.
THE MEMPHIS & LITTLE ROCK RAILROAD CO. (as Reorganized).

B. C. Brown, being sworn, on oath says that he is and for
36 more than five years last past has been the chief counsel of the defendant railroad company and is familiar with its affairs.

He says that the capital stock of said company is fifteen hundred thousand dollars, divided into fifteen thousand shares of one hundred dollars each; that he has obtained from the secretary of said company the schedule or statement hereto annexed, showing the names of the holders of said capital stock and the number of shares held by each on the 9th day of November, 1882; and he further says that the said statement is true, as shown by the books of the company; and, further, that he has examined the stock and transfer books of said company and that not one share of the stock thereof has been transferred to either Jay Gould, Russell Sage, or Henry G. Marquand, individually or jointly, since the 24th day of June, 1882. He also says that through his long connection with the company and through extensive inquires made by him he knows with tolerable certainty who of said stockholders are owners of bonds of said company secured by a mortgage or trust conveyance to R. K. Dow, Wm. S. Pierson, & Watson Matthews of date May 2nd, 1877, and from such knowledge he verily believes that over fourteen thousand shares of said stock are held by persons who have no interest in said bonds.

Affiant further says that said company, on May 1st, 1877, executed and issued its $250,000 of bonds and to secure payment thereof, by its deed of that date, conveyed all its property and franchises to Wm. S. Pierson, R. K. Dow, and Watson Matthews in trust to sell and convey on its default, a copy of which mortgage deed he files herewith, marked "A;" and, further, that all said bonds are outstanding and unpaid; that on May 2nd, 1877, the said company executed and issued its other bonds to the amount of $2,600,000, payable July 1st, 1907, with interest from date, and to secure payment thereof, by its other deed of that date, conveyed its same property and franchises to the same trustees in trust to sell and convey on its default, a copy of which mortgage deed is herewith filed, marked "B."

37 Affiant further says that the defendant has been and is advised by counsel and that the officers and managers of defendant believe that said last-named bonds and mortgage are illegal and void; that the present trustees are non-residents of the State of Arkansas, and that the takers and holders of said bonds are also non-residents of said State; that, being unable to obtain service upon said trustees and bondholders to any suit which it might bring in this State, the defendant in May last exhibited its bill in chancery against them in the circuit court of the United States for the south-

ern district of New York, praying cancellation of said bonds and other relief; that the present trustees of said deed have answered the same, and that said suit is still pending in said court. Affiant files herewith a copy of the said bill, marked "C," and will file a copy of the answer of said trustees thereto so soon as he can obtain the same.

Affiant further says that he has read the application of John L. Farwell to intervene in this cause and the answer, which he asks leave to file. He says that he is familiar with the suits mentioned by said Farwell in said answer; that it is true that on or about April 29th, 1882, R. K. Dow, Watson Matthews, and Charles Moran brought a suit in the circuit court of the United States for the eastern district of Arkansas to inforce a claim against the railroad and other property of defendant for money expended in paying a lien against said property. The said answer of Farwell, however, wholly fails to state the facts which affiant states are true, that said Dow, Matthews, and Moran paid said lien as trustees of said last-named deed of trust or mortgage and filed their said bill as such trustees; that before the answer and affidavit of Farwell was sworn to this defendant had appeared in said cause and had filed its answer, in which it alleged and set up the invalidity of said mortgage
38 — of the bonds secured thereby, and denied its liability or that of its property to their repayment, and had also filed its cross-bill against said trustees, alleging the same matters and praying that said mortgage be cancelled.

Affiant herewith exhibits copies of the bill, answer, and cross-bill in said cause, marked "E," "F," & "G," and further says that said cause is still in court pending; and he says that the other cause mentioned in said answer is a suit brought at law by one Frederick H. Cossit to recover against defendant the amounts specified in coupons to part of the bonds in said last-named deed specified. He files herewith a copy of the complaint in said cause, marked "H."

Affiant further says that he personally well knows R. K. Dow, who is one of the trustees of said deed, and who is, as affiant believes, the active managing trustee; that in the year 1880, after the great majority of the stock of defendant had been assigned on its books to Henry G. Marquand, said Dow had a conversation with affiant, he, Dow, at the time well knowing that affiant was the counsel of defendant; that said Dow appeared to anticipate that the liability of defendant for said last-named bonds would be contested, and told affiant that if the interest thereon was not paid no suit for foreclosure would be brought, but that the bondholders would bring suits at law, obtain judgment, and sell defendant's property under execution. In that conversation he remarked that they would bring a suit in the Federal court on each coupon each six months, and would thus have 2,600 suits. Affiant reminded him that the lowest jurisdiction of that court was five hundred dollars. He then made a short calculation and said that 13 forty-dollar coupons would be sufficient for one suit, and that they could and would have two hundred suits each six months.

Affiant further says that defendant failed to pay the interest which

matured upon said bonds on Jan. 1 of the present year; that within less than a week thereafter one of said bondholders attached
39 defendant's funds in a suit at law at Memphis, Tennessee; said interest was afterwards paid and said attachment discharged. Defendant defaulted on the interest which matured on said bonds on July 1 last.

As the court will see by the terms of the mortgage upon such default continued sixty days, it is in the power of the holders of said bonds to declare the principal of their bonds due and to foreclose said mortgage; yet, although the default has continued more than 60 days, no such suit has been brought, but, as afore shown and as threatened, suit at law upon coupons taken from a number of said bonds has been brought.

Affiant says that, as in duty bound, he communicated such threats to his client, and that, believing the same were earnest and seeing that they were carried into effect, he, seeing no other way to protect his client until it could bring its suits for cancellation of said mortgage to a hearing, advised it not to oppose the application made for a receiver in this cause; also advising it that by this court the funds received by defendant from its business would be cared for and applied for the best interests of all parties, and it says that defendant took its action in this behalf solely to enable it to have a fair hearing, and while obtaining such to protect itself from being harassed and its business destroyed by suits at law as threatened, and also that all parties might be assured that its funds could not be paid to its stockholders or otherwise misapplied. Affiant further says that he was consulted about the debt, for the recovery of which the plaintiff in this cause brought suit in the United States court, and for which defendant confessed judgment, and knows that the said debt was just and due, and that it was for money advanced for defendant to meet its pressing necessities.

B. C. BROWN.

40 Sworn to & subscribed before me Nov'r 10th, 1882.
[SEAL.] J. W. CALLAWAY, *Clerk.*

Filed in open court Nov'r 10th, 1882.
J. W. CALLAWAY, *Clerk.*

Pulaski Chancery Court.

RUSSELL SAGE
vs.
THE MEMPHIS & LITTLE ROCK RAILROAD CO., as Reorganized.

Comes R. K. Dow and respectfully shows to the court that he is a stockholder of the defendant company, being the owner of twenty-one and one-fourth shares of its stock, as evidenced by certificate No. 215 for 16¼ shares and certificate No. 296 for 5 shares; and he asks leave to intervene in this suit, and that he may be allowed to file the answer and cross-complaint which he presents herewith, and he says that the facts therein set forth are true.

U. M. & G. B. ROSE,
Of Counsel.

STATE OF NEW HAMPSHIRE, } ss:
County of Sullivan, }

On this day came before me, a notary public in and for said county, R. K. Dow, to me well known, and, being by me duly sworn, made oath that he believes the statements made in the foregoing petition to be true.

R. K. DOW.

41 Sworn to and subscribed before me.

Witness my hand and seal of office on this first day of November, 1882.

[SEAL.] ALBERT ROSSITER,
Notary Public.

In the Pulaski Chancery Court.

RUSSELL SAGE
vs.
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.

Comes Robert K. Dow and shows the court that he is the owner of twenty-one and one-fourth shares of capital stock of the defendant railroad company, as evidenced by its certificate No. 215 for 16¼ shares and certificate No. 296 for 5 shares, and for answer and cross-complaint herein he says that if it is true, as set forth in said complaint, that the plaintiff therein recovered judgment in the circuit court of the United States for the eastern district of Arkansas against said railroad company, as therein alleged, said judgment was, however, rendered by confession of said railroad company and by concerted agreement between plaintiff and defendant therein on the same day that the complaint asking for the same was filed.

Said judgment was rendered on the 24th day of June, 1882, the same day on which the complaint in this cause was filed in this court, as will be seen by reference to a transcript of said proceedings and judgment herewith filed, marked Exhibit "A" and made part hereof.

42 During the year 1881 said plaintiff, Jay Gould, and Henry Q. Marquand, acting together, acquired a majority in value of the stock of said railroad company.

On the 20th day of April, 1882, this defendant, Watson Matthews, and Charles Moran brought a suit in the said circuit court of the United States for the eastern district of Arkansas to enforce a claim against the said railroad company and its property for money expended in paying off a lien against the same in their favor amounting to about the sum of $250,000, which suit is now pending in said court.

Said confession of judgment was designed for no other purpose than as a preliminary step to the application to this court for a receiver herein, in order to hinder the prosecution of their said suit and to enable said Gould, Sage, and Marquand to depreciate the market value of the bonds issued by the company, of which many

are outstanding, and to depreciate the stock thereof so as to enable them to buy up the same for their common benefit at a low price, to the injury of this defendant and of all other stockholders save themselves.

That the said Sage, Gould, and Marquand are all men of very great wealth, who are able to wait until stock thus temporarily depreciated by them shall raise in price again after they shall have secured all or nearly all that may be in the hands of others and when it may be to their interest to permit said stock to be unaffected by the cloud cast upon it by the fact that a receiver is in charge of the road & all the property of the company, facts which naturally produce the impression in the markets of the world that the defendant railroad company is insolvent and that its stock cannot be of any value.

In short, this defendant says this suit is a mere sham, nothing more than a financial expedient, with no other object than that of enabling the said Sage, Gould, and Marquand to make a successful speculation in the stock & securities of the railroad company; that in respect of the matters set up in said complaint there is no antagonism either of feeling or interest between said plaintiff and said rail-
43 road company, but that they have caused this suit to be brought & maintained in collusion with each other for a common purpose. They have caused a board of directors to be elected for said company, who have acted in strict subservience to their interests and to their requirements alone. This suit was brought by the plaintiff herein, & appearance was entered by the said railroad company without process, and a receiver was appointed by consent, the attorney of the plaintiff acting with the attorney of the defendant company, both in taking the said judgment by confession and in taking the said order for a receiver. The pretense that there is any controversy between the said parties is false in every particular and is a fraudulent device by means of which the said Sage, Gould, & Marquand and said company, as controlled by them, seek to make this court a mere instrument for their selfish, pecuniary purposes, to be attained at the expense of this defendant & other stockholders of the company. The allegation made in the complaint that said railroad company is — is untrue. The pretense that a necessity existed for the appointment of a receiver in this cause is false in every particular. The total annual earnings of the company are not less than seven hundred & fifty thousand dollars, and since the coupons on the bonds of the said company that fell due on the first day of January, 1882, & which were paid in the month of March, 1882, the said railroad company has paid no interest on its bonded debt, and nothing on any debt, save, possibly, some trifling amounts for labor or supplies. The refusal to pay any further interest on the bonds of the company was dictated by the said Gould, Sage, and Marquand, with a view to lessen the value of the stock and securities of the company so as to enable them to buy up the same or to force a compromise of said securities. The bonded debt of the company is about twenty-eight hundred & fifty thousand dollars, of which
44 $2,600,000 bears interest at eight per centum. per annum,

and most of the residue bears interest at a still higher rate. This interest is payable on the first days of January and July in each year. As no part of said interest falling due on the first day of July, 1882, was paid, it is clear that if any debt is due to the said Sage, which this defendant does not admit, there is no reason why the same has not been paid off. Since the first day of January, 1882, no valuable or costly improvements have been placed on said road.

It was by the collusion aforesaid that the said parties procured the appointment of the manager of the road, who was subject to the orders of the board of directors of the company as receiver herein. Since said appointment several months have elapsed, yet said receiver has never been called on to make any report, nor has any step been taken by the parties in this suit, as they originally appeared, save to get orders to defend suits and pay out money for costs.

Since said appointment was made suits have been brought in the United States circuit court for the eastern district of Arkansas against said company, and when the officers of the law came to serve writs of summons they were informed by the attorney of the company that there was no director, officer, or agent of the company in this State, as they had all resigned and said agents had accepted new appointments under said receiver, which statement this defendant charges to be true; thus under cover of this court the said company is seeking to evade the service of legal process.

The effect of these fictitious proceedings has been already greatly to the damage of the stockholders, as by them and the other fraudulent devices of the said Sage, Gould, and Marquand the said stock has been greatly depreciated in the market, which depreciation still continues and probably will do so as long as they can successfully keep a sham suit pending in this court and can keep a receiver in possession of said road, thereby producing a false impression in the market that the company is insolvent and hopelessly involved in litigation.

This defendant makes this answer a cross-complaint against Sage and said railroad company, and he asks that they be compelled to answer the same; that said Sage may be required to prove his demand against the company, if he claims that such a demand really exists; that upon its being made to appear that such demand either never existed or has been paid off, said Sage may be injoined from all efforts to inforce it; that said receiver may be required to report what he has done under his appointment and how he has expended the funds that have come into his hands, and that he be discharged, and that said railroad company be injoined from all further attempts to depreciate its stock and securities for the pecuniary profit of the said Sage, Gould, & Marquand or any other combination of stockholders, and for all other proper relief.

U. M. & G. B. ROSE.

STATE OF NEW HAMPSHIRE, } ss:
County of Sullivan, }

On this day came before me, a notary public in and for said county, Robert K. Dow, to me well known, & made oath that he believes the statements made in the foregoing answer and cross-complaint to be true.

R. K. DOW.

Sworn to and subscribed before me.

Witness my hand and official seal on this 1st day of November, 1882.

[SEAL.] ALBERT ROSSITER,
Notary Public.

46 *Petition for Removal to the United States Circuit Court for the Eastern District of Arkansas.*

In the Pulaski Chancery Court.

JOHN L. FARWELL
vs.
RUSSELL SAGE & THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY, as Reorganized.

To the said court:

Your petitioners, John L. Farwell and Robert K. Dow, would show that the amount in dispute between him and said railroad company exceeds, exclusive of costs, the sum or value of five hundred dollars.

That said controversy is between citizens of different States; that petitioners were both, at the time of the commencement of this suit, citizens of the State of New Hampshire, and has so continued to be until this time; that said Sage then was and still is a citizen of the State of New York, and that said railroad company then was and still is a corporation created by the laws of the State of Arkansas.

And your petitioners offer herewith a bond with good and sufficient surety for their entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And they pray this honorable court to proceed no further herein, except to make the order of removal as required by law and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the said eastern district of Arkansas; and they will ever pray.

U. M. & G. B. ROSE.

47 Know all men by these presents that we, John L. Farwell and Robert K. Dow, as principals, and U. M. Rose, as surety, are held and firmly bound unto Russell Sage and the Memphis and Little Rock railroad, as reorganized, in the penal sum of two hun-

hundred and fifty dollars; payment whereof, well and truly to be made unto them, we bind ourselves by these presents.

Yet upon these conditions: That the said Farwell and Dow having petitioned the Pulaski chancery court, in the State of Arkansas, for the removal of a certain cause therein pending between themselves and said Russell Sage and said Memphis and Little Rock Railroad Company, as reorganized, to the circuit court of the United States for the eastern district of Arkansas:

Now, if said Farwell and Dow shall enter — the circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to be and remain in full force and virtue.

Witness our hands and seals on this 10th day of November, 1882.

U. M. ROSE. [SEAL]

____ ____. [SEAL]

____ ____. [SEAL]

In the Pulaski Chancery Court.

RUSSELL SAGE

vs.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.

The Memphis and Little Rock Railroad Company, as reorganized, defendant in the above-entitled cause, states that plaintiff is and was, at the commencement of this suit, a citizen of the State
48 of New York, and that the defendant is and was, at the commencement of this suit, a citizen of the State of Arkansas; that the amount in controversy between plaintiff and this defendant exceeds five hundred dollars, exclusive of costs, and it desires to remove this cause to the circuit court of the United States for the eastern district of Arkansas.

It tenders herewith a bond, with sufficient security, conditioned as required by the act of Congress in such case made and provided, and prays that the court order that this cause be transferred and removed to said circuit court of the United States.

And as in duty bound, &c.

B. C. BROWN,
Attorney for Plaintiff and Petitioner.

Pulaski Chancery Court.

RUSSELL SAGE

vs.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.

We acknowledge ourselves bound unto Russell Sage in the sum of two hundred and fifty dollars, for the payment whereof we bind ourselves.

Witness our hands and seals this 10th day of November, 1882.

The condition of this bond is that whereas the Memphis and Little Rock Railroad Company, as reorganized, has this day filed in the chancery court of Pulaski county a petition to remove the above-entitled cause to the circuit court of the United States for the eastern district of Arkansas, now, if the said Memphis and Little Rock Railroad Company, as reorganized, shall enter into the said
49 circuit court of the United States, on the first day of its next session, a copy of the record in said suit and well and truly pay all cost that may be awarded by said circuit court of the United States if the said court shall hold that the said cause was wrongfully removed thereto, then this obligation shall be void; otherwise remain in full force and effect.

B. C. BROWN.

Approved in open court November 10th, 1882.

D. W. CARROLL,
Chancellor.

STATE OF ARKANSAS, *County of Pulaski:*

In testimony that the foregoing is a true, complete, and compared copy of the record and proceeding of the Pulaski chancery court in the case of Russell Sage *vs.* The Memphis and Little Rock Railroad Company, as reorganized, as appears of record and on file in my office, I, J. W. Callaway, clerk of said chancery court, hereunto set my hand and affix the seal of said court, at office, in the city of Little Rock, on this 9th day of November, A. D. 1882.

[SEAL.] J. W. CALLAWAY, *Clerk.*

50 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 22nd day of October, anno Domini one thousand eight hundred and eighty-three, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on November 26, 1883:

Comes Ira Colby, by U. M. & G. B. Rose, Esqs., his solicitors, and files herein his claim.

And on December 1st, 1883, the following proceedings were had:

Come F. H. Cossitt, Amos R. Eno, A. D. Juilliard, John L. Farwell, Elizabeth C. Stokes, Helen M. Juilliard, Wm. Breck, Mary C. Dodge, W. G. Wheeler, W. B. Miller, Henry Talmadge, Chas. Moran, G. T. Bonner & Co., Geo. E. Dodge, W. P. Miller, Thomas Stokes, R. K. Dow, Wm. Clark, F. H. Cossitt, M. L. Dow, John L.
Farwell, E. W. Barnes, Geo. Dow, Henry Sandford, Henry E.
51 Bailey, Wm. Breck, W. M. Chamberlain, A. D. Juilliard, Elizabeth C. Stokes, Helen M. Juilliard, W. G. Wheeler, W. B. Miller, Wm. A. Goodwyn, Geo. E. Dodge, E. W. Burns, and May C. Dodge, by U. M. & G. B. Rose, Esqs., their solicitors, and by leave of count file herein their respective claims.

And on December 3rd, 1883, the following proceedings were had:

On this day came the complainant, by Cockrell, his coupsel, and the defendant, by Brown, its counsel, and Ira Colby and others, by U. M. & G. B. Rose, and the court being sufficiently advised what judgment to enter herein touching the continuance of the receivership, it is ordered that E. K. Sebley, the receiver of this court in the cause, do at once surrender and deliver to the defendant, The Memphis and Little Rock Railroad Company, as reorganized, all the property of every kind in his hands, taking and filing its receipt therefor, and that such surrender and delivery of such property take effect as of the first day of December, 1883; and it is further ordered that said receiver, out of the moneys in his hands,
52 do pay all sums and dues authorized by the order appointing him receiver, and that he retain the residue subject to the further order of this court, and also that without unnecessary delay he make and file in court here a full and complete report of his acts and doings, showing that moneys have been by him received and expended, and for what purpose expended, retaining his vouchers subject to the further order of this court; and it is further ordered that plaintiff have leave to withdraw the consent, order, and agreement heretofore filed, but the said railroad and other property in the hands of the receiver are delivered to the defendant only upon the condition that the defendant assume all the liabilities of the receiver and agree to pay and discharge out of said property or its income all demands which may be established against the receiver, to which the defendant assents and agrees that if it should fail to discharge any such liability legally established by the judgment of any court of competent jurisdiction the court in this cause, which is retained only for that purpose, may retake possession of such property and enforce by proper order the payment and
53 satisfaction of such judgment.

And on February 12, 1884, the following proceedings were had:

And on this day came the complainant, by S. R. Cockrell, Esq., his solicitor, and the defendant, by B. C. Brown, Esq., its solicitor, and E. K. Sibley, the receiver in this cause, in his own proper person; and said receiver files here in court his report and accounts of his administration of the property in his hands, from which it appears that there are a few unsettled accounts for traffic balances due to and from him, being claims which he has been unable to adjust; and thereupon, the defendant in open court assuming to pay all such balances due from said receiver, it is, by consent of parties, ordered that said receiver transfer all such balances to defendant and defendant receive and retain the same for its own use; and thereupon complainant files his motion and petition praying that the receiver, out of the funds in his hands, pay his, complainant's, judgment in the bill mentioned; and defendant files its motion to strike from the files sundry claims filed by parties claiming
54 to be creditors of defendant, and also its motion that after payment of the amount due complainant all sums of money left in hands of receiver be paid to defendant and Ira S. Colby, W.

G. Wheeler, F. H. Cossitt, E. W. Barnes, W. B. Miller, Henry Talmadge, W. G. Wheeler, M. C. Dodge, W. P. Miller, John L. Farwell, Geo. E. Dodge, Wm. Clark, R. K. Dow, Thos. Stokes, H. Sanford, F. H. Cossitt, Chas. Moran, G. T. Bonner & Co., W. B. Miller, Amos R. Eno, A. D. Juilliard, John L. Farwell, A. D. Juilliard, Geo. E. Dodge, Geo. Dow, Wm. A. Goodwyn, M. L. Dow, E. C. Stokes, M. C. Dodge, Wm. M. Chamberlain, H. E. Bailey, E. W. Barnes, E. C. Stokes, H. M. Juilliard, H. M. Juilliard, Wm. Breck, Wm. Breck, and file amendments to their claims of intervention herein.

Which motion to strike is as follows:

Comes the defendant and moves the court to strike from the files of this case the claims and motions of H. Sanford, E. W. Barnes, John L. Farwell, M. L. Dow, F. H. Cossitt, Wm. Clark, R. K. Dow, Thos. Stokes, W. P. Miller, Geo. E. Dodge, G. T. Bonner & Co., Chas. Moran, Henry Talmadge, W. B. Miller, W. G. Wheeler, M. C. Dodge, Wm. Breck, H. M. Juilliard, E. C. Stokes, John L. Far-
55 well, A. D. Juilliard, Amos R. Eno, Geo. Dow, H. E. Bailey, W. M. Chamberlain, William A. Goodwyn, and E. W. Barnes, because the parties making such claims and motions are not parties to this cause, and because they neither show nor have any right to or any lien upon the funds in the hands of the receiver, and because there is no equity in said motions or any of them.

Respectfully,

B. C. BROWN,
Solicitor for Comp't.

Filed February 12, 1884.

RALPH L. GOODRICH, *Clerk*,
By W. P. FEILD, *D. C.*

And on February 14, 1884, the following proceedings were had:

On this day comes the complainants, by S. R. Cockrell, Esq., its counsel, and also comes H. Sanford, E. W. Barnes, John L. Farwell, M. L. Dow, F. H. Cossitt, Wm. Clark, R. K. Dow, Thos. Stokes, W. P. Miller, Geo. E. Dodge, G. T. Bonner & Co., Chas. Moran, Henry Talmadge, W. B. Miller, W. G. Wheeler, M. C. Dodge,
56 William Breck, H. M. Juilliard, E. C. Stokes, John L. Farwell, A. D. Juilliard, Amos R. Eno, Geo. Dow, H. E. Bailey, W. M. Chamberlain, William A. Goodwyn, Ira S. Colby, and E. W. Barnes, by U. M. & G. B. Rose, their counsel.

And the motion of defendant to strike out the claims made by the said H. Sanford and others coming on to be heard was argued by counsel, pending which argument the said Sanford and others amended their claims by adding the words following—that is to say:

"Claimant says that the bill filed in this suit and all the subsequent proceedings thereon have been simulated, collusive, and fraudulent and intended to cheat, hinder, and delay this claimant and others in like cases in the collection of their just debts, one of which is evidenced by said judgment in favor of this claimant; wherefore he prays that his said claim may be paid out of said fund in preference to all unsecured debts against said defendant," which

amendment being made the court overruled the said motion
57 of defendant to strike out the said claims.

And the court, not being sufficiently advised as to the matters of fraud and collusion alleged in and by such amendment to said claim, hereby refers said question to Charles P. Redmond, Esq., the master of this court, who is directed to allow complainant and defendant in this cause to make answer to the said claims, and demands to hear and take all testimony offered by said petitioning creditors and by complainant and defendant as to such allegations of fraud and collusion, and to report such testimony, together with his findings, as to whether such alleged fraud and collusion between complainant existed or not; and it is further ordered that the time for taking such testimony be, and it is hereby, limited to sixty days from this date.

And the motion made by complainant that the receiver be ordered to pay his judgment, and the motion by defendant that the receiver be ordered to pay the residue of the money in his hands to it, and the claims of the said Sanford and other subse-
58 quent judgment creditors of defendant, that the receiver be ordered to pay off their judgments, are reserved until the coming in of said report.

And it is further ordered that the receiver, E. K. Sibley, pay all monies in his hands into the Merchants' National Bank, a United States depository at Little Rock, or with the assistant Treasurer of the United States at St. Louis or New York, whichever may be most convenient, to the credit and subject to the orders of this court, and also that the said receiver is ordered to pass his accounts before the said master, who is to report whether any allowance should be made to the receiver for his services out of the fund in his hands, and, if any, what amount should be allowed him.

And it is further ordered that said master examine all the records, papers, and briefs of this cause and of all the other causes pending in this court within six months before the institution of this suit down to the present time in which the parties to this suit or either of them may be or have been parties, and he shall report
59 the amounts and matters involved therein and upon what said suits are based, the time of the bringing of said suits, the defenses interposed, and the final judgments and decrees in the same, as far as the same may have been rendered, and whether appeals or writs of error have been taken, and also that he inquire and report as to what, if any, mortgages have been executed by defendant.

And on February 19, 1884, the following proceedings were had:

Now, on this day, came said plaintiff, by S. R. Cockell, his solicitor, and also came said defendant, by B. C. Brown, its solicitor, and also came Ira S. Colby, by U. M. & G. B. Rose, his solicitors, and by leave of the court said Colby files herein his amended and substituted claim and intervention, and it is, by consent of parties, ordered that said amendment be taken as having been made in similar

language by Amos R. Eno and Henry Talmadge, other interve-
60 nors herein; and also came F. H. Cossitt, by U. M. & G. B. Rose, and by leave of court files herein his amended and substituted claim and intervention, and it is, by consent of parties, ordered that said amendment be taken as having been made in similar language by H. M. Juilliard, W. G. Wheeler, E. W. Barnes, W. B. Miller, William Breck, Henry Talmadge, W. P. Miller, John L. Farwell, Geo. E. Dodge, Wm. Clark, R. K. Dow, Thomas Stokes, H. Sanford, Charles Moran, G. T. Bonner & Co., A. D. Juilliard, Geo. Dow, William A. Goodwyn, M. L. Dow, E. C. Stokes, William M. Chamberlain, H. E. Bailey, and that, for the purpose of hearing, all of said claims be consolidated.

And on February 23, 1884, the following proceedings were had:

Come R. K. Dow *et al.*, trustees, by U. M. & G. B. Rose, Esqs., their solicitors, and file herein their claim and intervention.

And on March 7, 1884, the following proceedings were had:

61 Now, on this day, came Ira Colby, by U. M. & G. B. Rose, his solicitors, and on his motion it is ordered that in making up his report herein the master show—

1. The total amount of money which has come to the hands of the receiver.

2. The amount expended by him in the new construction and improvement of the road.

3. The operating expenses of the road while in his hands.

4. The amount paid out by said receiver for costs and attorneys' fees in this suit, and to whom attorneys' fees have been paid, and for what services.

5. The total amount of money with which said receiver should be charged on a final settlement of his accounts.

And on April 7, 1884, the following proceedings were had:

On this day came said plaintiff, by S. R. Cockrell, and also came said defendant, by B. C. Brown, and came Ira Colby and
62 other interveners, by U. M. & G. B. Rose; and it is now ordered that all persons claiming any part of the fund in court file their claims in this cause, and that they be referred to said master, who will report to this court how said fund shall be paid out.

63 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 14th day of April, anno Domini one thousand eight hundred and eighty-four, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on 14 April, 1884:

Comes the complainant, by S. R. Cockrill, Esq., his solicitor, and files herein a statement of complainant's claim.

And on April 15, 1884, the following proceedings were had:

Come R. K. Dow, Watson Matthews, and Charles Moran, by U. M. & G. B. Rose, Esqs., their solicitors, and by leave of court file herein their claim of intervention.

And on April 21, 1884, the following proceedings were had:

64 Comes the complainant, by S. R. Cockrell, his attorney, and the defendant, by B. C. Brown, its attorney, and the interveners, by U. M. & G. B. Rose; and now the master herein having made report to the court that there is due to E. K. Sibley, receiver in this cause, four thousand one hundred and sixteen dollars and sixty-nine cents for his services as receiver herein, and there is due to B. C. Brown, Esq., as counsel for receiver, the sum of one thousand dollars, and that no objection was taken in the master's office to these allowances, and all parties consenting thereto, it is, therefore, ordered that the clerk draw his warrants upon the fund in the registry of this court in this cause, one to the order of E. K. Sibley for four thousand one hundred and sixteen dollars and sixty-nine cents (4,116.69), and one to the order of B. C. Brown for one thousand dollars (1,000), and deliver the same to said Brown and Sibley, taking their receipts in duplicate therefor, one of which duplicate receipts the clerk will deliver to the master herein to be incorporated in his report in this cause.

65 And on May 15, 1884, the following proceedings were had:

Now, on this day, came said defendant, by B. C. Brown, Esq., his attorney, and also came the City of Memphis, by U. M. & G. B. Rose, and files herein her petition for the payment of one thousand six hundred and sixty-six dollars and sixty-seven cents (1,666.67) due said petitioner for rent of depot grounds; and it appearing to the court that vouchers for said claim have been heretofore approved by E. K. Sibley, as receiver in this cause, and said defendant consenting thereto, it is now ordered that said sum of one thousand six hundred and sixty-six dollars and sixty seven cents be paid to said petitioner out of the fund in this court in this cause, and that the clerk draw his warrant therefor accordingly, which order shall be drawn in favor of Rudolph Fink, the receiver at present in charge of said railroad, who shall pay off said demands of said petitioner.

And on May 22, 1884, the following proceedings were had:

66 Comes Charles P. Redmond, Esq., master, and files herein his report; which report is as follows:

67 *Master's Report. Charles P. Redmond, Master.*

Circuit Court of the United States, Eastern District of Arkansas.

RUSSELL SAGE, Complainant,
v.
THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant. } No. 512.

Filed May 22, '84.

RALPH L. GOODRICH, *Clerk.*

68 & 69 (Index omitted here in printing. See index to record.)

70 *Master's Report.*

In the Circuit Court of the United States, Eastern District of Arkansas, in Chancery Sitting.

RUSSELL SAGE, Complainant,
v.
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized, Defendant, } No. 512.

Report on receiver's accounts.

To the honorable the judge of the circuit court of the United States for the eastern district of Arkansas:

The master, to whom this cause was referred to pass the accounts of E. K. Sibley, the receiver herein, would respectfully report that on the twenty-sixth day of February, 1884, he gave notice to the counsel for all the parties to this suit and to the receiver that he would proceed on the third day of March, 1884, to the examination and passing of the receiver's accounts as appears by a copy of said notice, with proof of service attached and hereto annexed, marked "Exhibit C;" that no person appeared before the master in response to said notice; that said master thereupon proceeded from day to day to the examination of said accounts *ex parte*.

71 And the master, on April 4, 1884, gave further notice to counsel to examine the accounts and vouchers on file in the master's office, as shown by "Exhibit S" hereto; and on the last-named day counsel for all the parties entered their appearance in the master's office for all purposes of this reference, as shown by "Exhibit T" hereto.

The master has filed herewith nineteen schedules of the monthly disbursements of said receiver, marked "Exhibit A" to A^{19}, showing every disbursement made by the receiver and for what each payment was made, including the pay-rolls of said receiver; and has also filed with the clerk (as per his receipt marked "Exhibit D") 4,548 vouchers, duly receipted, for each of said disbursements, which have been severally compared with said schedules "A" and found correct and stamped by the master as passed and allowed, amounting in the aggregate to $997,809.64; and has also filed with the clerk (as per said "Exhibit D") the nineteen duplicate pay-rolls with some seventeen or eighteen thousand items receipted, amounting to and being vouchers for $459,111.11, as shown upon said schedules "A," which have been examined and found correct, making vouchers for payments in the aggregate, as shown on said schedules "Exhibits A" to A^{19}, vouchers and pay-rolls together, $1,456,920.75.

The master also attaches hereto the monthly debtor and creditor statements of said receiver, marked "Exhibits B" to B^{18}, showing the total monthly receipts of said receiver and the balances in his hands at the end of each month and from what source received, showing the total receipts of said receiver from June 24, 1882, to December 1, 1883, to be $1,675,919.73, thus showing the balance in

receiver's hands December 1, 1882, to be $218,998.98; which above-mentioned receipts and disbursements correspond with the report of the receiver filed in this court February 12, 1884.

72 Some of the vouchers for payments which did not sufficiently explain themselves are elucidated in the deposition of John W. Goodwin, secretary for the receiver, hereto annexed, marked "Exhibit E." Said accounts as to disbursements, receipts, and correctness of vouchers are also verified by said Goodwin in his deposition.

The accounts are also verified by the receiver with the customary receiver's oath, "Exhibit V" hereto. The master has carefully examined and inquired into the nature and sources of the receipts by the receiver, and is satisfied of their correctness as sated in said "Exhibit B."

And no person appearing in the master's office (though all parties were duly notified) to object to any of the disbursements of said receiver, or to question the correctness of his statement of his receipts, or in any otherwise to except to said accounts, after a careful and laborious examination of over 4,500 vouchers and pay-rolls of some 18,000 items, without the aid of counsel or parties, and *ex parte*, the master is satisfied, as well as he can be by an *ex parte* proceeding, that all of said accounts are correct, and should be passed as stated, and the master so reports.

The master has attached hereto statement marked "Exhibit G," showing the balances of cash in hands of receiver at end of each month; and also statement marked "Exhibit H," showing the total disbursements for each month; and statement "Exhibit J," showing total gross receipts for each month; and statement "Exhibit K," showing amount paid on pay-rolls for each month; and statement "Exhibit L," showing amount paid on vouchers each month.

On April 4, 1884, the counsel for the several parties acknowledged notice that the receiver's accounts had been found correct as stated, and that they might except to same, as shown by "Exhibit S," hereto, and no objection or exceptions to said accounts has been taken.

73 *Report on Total Amount which Has Come to Hands of Receiver.*

The accounts of the receiver show the total amount that has come to his hands during the receivership to be $1,675,919.73, which corresponds with his report to the court, and is found correct and accounted for.

Report on Amount Chargeable to Receiver on Final Settlement.

The master finds from the foregoing statements that the amount which would be chargeable to receiver on final settlement of his accounts is the sum of $218,998.98, which said receiver has deposited in accordance with the orders of this court and fully acquitted himself of, and there is, therefore, no amount to be charged to him.

Report on Receiver's Allowance.

No objection having been made by any person to the receiver being compensated for his services, and as he has given bond for the faithful discharge of his duties and has acted as receiver and general manager for seventeen months, and has well and duly accounted for the property and the incomes thereof, no reason is seen why he should not be compensated for his services. It is therefore reported that said receiver should have an allowance.

The receiver has filed with the master his claim (hereto annexed, marked "Exhibit R") for an allowance of $7,500 per annum, in addition to the salary drawn by him as general manager of $6,000 per annum, in which he shows that he has acted as both receiver and general manager, and has thus saved the company the salary of one office. It also appears by the records of this court that R. K. Dow, a previous receiver of the same property, was allowed $7,500 per annum as receiver when the receipts and business of the road were much less than during the recent receivership.

74 It is therefore reported, no person objecting thereto, that said receiver be allowed at the rate of $7,500 per annum for his services as receiver, in addition to his salary of $6,000 per annum as general manager, which, for the seventeen and one-fifth months of his official life, would amount to $10,750; and it appearing that his salary as general manager for the seventeen and one-fifth months of the receivership would be $8,600, making in all due him $17,850, of which amount he has already received $13,733.31, thus leaving due to him to be paid from the fund $4,116.69—

The master does not think as he is still general manager of the road, with full control of the books, papers, and officers of the company, and is drawing a salary as manager, that he should receive compensation for the period during which his accounts are being settled, and especially so, in view of the foregoing liberal allowance to him. The claim therefore for compensation in that respect is disallowed.

Pending the hearing of this matter before the master, he was ordered immediately to report the amount due to E. K. Sibley, the receiver herein, and to B. C. Brown, Esq., the counsel for receiver, whereupon, on April 21, 1884, he reported as above the amount due said receiver $4,116.69, which sum has been paid said receiver by order of the court, as per his receipt hereto annexed, marked "Exhibit Z^6," the same being paid from the fund in court.

Report on Testimony Taken.

On the fourth day of April, 1884, the several counsel for the respective parties came into the master's office and entered their appearance for all the purposes of the reference herein, as appears by "Exhibit T," hereto.

And on the same day and place, pursuant to notice attached to "Exhibit M^2," hereto, the depositions of E. K. Sibley ("Ex-
75 hibit M^2") and S. R. Cockrill, "Exhibit O," were taken, and on the fifth day of April, 1884—present same counsel—the deposition of J. W. Goodwin, "Exhibit E^2," was taken.

The depositions of E. K. Sibley, "Exhibit M^1," J. W. Goodwin, "Exhibit E^1," and H. G. Fleming, "Exhibit N," were taken by the master on his own motion, no counsel for either party being present, but the same were perused by counsel for all parties previous to the depositions taken by them.

The depositions of Russell Sage, A. H. Calef, and H. G. Marquand, "Exhibit W," were filed in the master's office April 26, 1884.

The depositions of C. G. Warner and Governor Brown, "Exhibit X," were filed May 2, 1884.

The deposition of U. M. Rose, "Exhibit Y," was filed April 25, 1884.

"Exhibits Z^M, Z^N, Z^O, Z^P, and Z^R" were filed April 22, 1884, and "Exhibits Z^S and Z^L" were filed May 2, 1884.

Report on Amount Expended for New Construction

It is difficult, almost impossible, without a very lengthened and detailed investigation, to accurately arrive at the amount expended on the property for new construction and betterments, no separate account having been kept by the receiver of betterments to the property; no "construction account."

The master has endeavored to arrive at it approximately by an examination of the accounts, and of H. G. Fleming, the engineer of the receiver.

The engineer states in his deposition that the total amount of expenditures during the receivership, which, under a former system of keeping the books, would have been charged to construction account, would be $59,412.13; in which statement of his construction account (attached to his deposition) he has not noticed the
76 expenditure of $226,000 for new rails, $16,560 for fastenings and spikes for new rails, $9,000 for laying new rails, and only $2,712 of the $49,428.44 expended for the repairs of bridges, and has not included any of the $32,000 expended for cross-ties, and nothing of the $18,841 for repairs to locomotives, and none of the $31,284 for maintenance of cars.

The engineer estimates the value of the actual corporeal property of the company (exclusive of its increased capacity for business) at the end of the receivership to be worth $225,000 more than at the beginning, by reason of improvements made on it.

It seems to the master that this is a low estimate of the betterments, as shown by the expenditures made.

The master for himself, in light of the actual expenditures, as shown by the accounts on file in his office, would make the following estimate:

Construction account	$59,412 13
New rails	226,010 63
80 per cent. of $20,711 for fastenings and spikes	16,570 16
Laying new iron	9,000 00
Total	$310,992 92

This estimate of the master includes none of the $47,000 for bridge repairs, none of the $32,000 for cross-ties, nor the $18,841.04 for repairs to locomotives, and nothing for the $31,284.25 for maintenance of cars.

It seems from the foregoing, therefore, to the master that it would be a low and very safe statement to say that there was expended on the property for betterment and new construction during the receivership $300,000, and the master so reports.

Report on Operating Expenses.

77 The same difficulty attends the solution of this inquiry, and for the same reasons as that of the "new construction and betterments" of the road, and it can only be arrived at, under the circumstances, by similar approximate estimate.

The receiver in his report to the court of February 12, 1884, and by his "Exhibit D," filed therewith, shows the total expenditure during the receivership for operating the road and betterments and improvemenis thereon to be $1,102,118.39, less a credit of $60,704.57 for old iron sold, being total for operating expenses, betterments, and improvements of $1,041,413.82, which an examination of his accounts and vouchers shows to be correct.

Now, if we deduct the $300,000 we have found to have been expended in betterments from this $1,041,413.82, it will leave $741,413.82 as the cost of operating the road during the receivership.

This, of course, as stated in the report on betterments, is approximate, and the master thinks by an extended and detailed examination would be considerably reduced, but for the purposes of this report the master is informed is sufficiently accurate. He therefore reports the operating expenses of the road during the receivership to be $741,413.82.

Report on Mortgages.

In response to the order of reference herein the master reports that said railroad company has executed two mortgages and a supplementary mortgage as follows:

One dated May 1, 1877, to secure bonds amounting to $250,000, maturing in installments of $50,000 each, due May 1, in the years 1879 to 1883, inclusive, and bearing ten per cent. interest.

And one dated May 2, 1877, to secure bonds to the amount of $2,600,000, bearing interest after July 1, 1882, at eight per cent., and payable July 1, 1907.

And a supplemental mortgage dated the twenty-sixth day of September, 1877, supplying an omission in one clause of the
78 mortgage of May 2, 1877; and these are all the mortgages of record in Pulaski county, Arkansas, made by said company, as appears by the certificate of the recorder of said county hereto annexed, marked "Exhibit F."

Report on Amount Paid for Attorneys' Fees and Costs.

Upon examination of the vouchers and accounts of the receiver and the testimony of the receiver hereto annexed it appears that no attorneys' fees have been paid out by him in this cause, unless the payment made by him of $1,000 (per voucher No. 214, for November, 1883), to B. C. Brown, Esq., for legal services rendered the receiver can be so considered. This item of $1,000 for legal services for seventeen months is deemed by the master very reasonable, and he has, therefore, allowed the same, the receiver being justified in employing the counsel of the railroad company by the order of the chancellor appointing him, that order expressly authorizing him to do so.

The receiver has during the receivership paid to the following attorneys their regular monthly salaries as previously paid them by the company, to wit:

B. C. Brown, $300 per month.
W. G. Wheatherford, $62.50 per month.
George Sibley, $20 per month.
John W. Cameron, $20.83 per month.

Which payments are deemed proper and reasonable, and are so reported.

Costs of Suit.

In regard to the costs of this suit, it appears the receiver has paid to the clerk of Pulaski chancery court, where this suit originated, the costs in that court of $50 (as per voucher No. 200, for September, 1882), and also cost of transcript from that court to this
79 of $28 (as per voucher No. 109, for January, 1883), and has also paid the costs in the action on the law side of this court wherein the judgment was rendered, upon which this suit is based, for $4.30 (as per voucher No. 3, for June, 1882).

At the suggestion of intervenors, the master attaches hereto a schedule of the disbursements of receiver for legal expenses of various kinds, exclusive of salaries, marked "Exhibit U."

Pending this matter before the master, he was ordered to report forthwith upon any allowance to counsel for receiver, and B. C. Brown, the counsel for receiver, having filed with the master his claim, "Exhibit P" hereto, for $1,000 for services to receiver, in addition to the $1,000 paid him by the receiver, which claim has been allowed by the master as just, and on April 21, 1884, so reported to and allowed by the court; and the same has been paid to said counsel from the fund in court, as per his receipt hereto attached, marked "Exhibit Z^{r}."

As germane to this subject, though not directly responsive to the reference on this matter, the master further reports that it is shown by "Exhibit X," in connection with "Exhibit Z^{m}," that defendant has paid $400 to S. R. Cockrill, Esq., solicitor for complainant herein—paid for defendant during receivership—refunded by it since receivership.

Report upon Suits Brought.

The following suits at law have been commenced against the Memphis and Little Rock Railroad Company (as reorganized), at the dates, upon the matters, and by the parties given below:

No. 3111.

Russell Sage, commenced June 24, 1882. Judgment by confession, June 24, 1882 ..... $125,921 13

This suit was brought upon two promissory notes of said railroad company: one for $15,000, dated Little Rock, June 20, 1881, payable five months after date to order of H. G. Marquand, president, and indorsed to Russell Sage, and credited with $5,000 on December 30, 1881.

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The other note is dated New York, June 20, 1882, payable on demand to order of Jay Gould, president of Missouri Pacific Railway Company, is for $115,479.03, signed by F. A. Marquand, president, and indorsed, "Pay to the order of Russell Sage, Missouri Pacific Railway Company. By Jay Gould, president."

The judgment in this case was confessed in pursuance of a vote of the board of directors of said defendant held at St. Louis, Missouri, on June 22, 1882.

No. 3162.

F. H. Cossitt, commenced October 2, 1882. Judgment by default, April 17, 1883 ..... $4,903 89
On general mortgage coupons.

No. 3187.

Martha L. Dow, commenced November 3, 1882. Judgment by default, April 18, 1883 ..... $4,625 25
On general mortgage coupons.

No. 3188.

John L. Farwell, commenced November 3, 1882. Judgment by default, April 18, 1883 ..... $3,384 51
On general mortgage coupons.

No. 3189.

Henry E. Bailey, commenced November 3, 1882. Judgment by default, April 19, 1883 ..... $3,084 00
On general mortgage coupons.

No. 3190.

W. G. Wheeler, commenced November 3, 1882. Judgment by default, April 19, 1883 ..... $2,725 23
On general mortgage coupons.

No. 3266.

George Dow, commenced February 15, 1883. Judgment by default, April 19, 1883 ..... $4,723 52
On general mortgage coupons.

81 No. 3267.

William M. Chamberlin, commenced February 15, 1883. Judgment by default, April 19, 1882 ..... $678 48
On general mortgage coupons.

No. 3268.

W. B. Miller, commenced February 15, 1883. Judgment by default, May 3, 1883 ..... $1,236 60
On general mortgage coupons.

No. 3269.

George E. Dodge, commenced February 15, 1883. Judgment by default, April 19, 1883 ..... $3,763 09
On general mortgage coupons.

No. 3270.

A. D. Juilliard, commenced February 15, 1883. Judgment by default, April 19, 1883 ..... $4,626 75
On general mortgage coupons.

No. 3271.

Mary C. Dodge, commenced February 15, 1883. Judgment by default, April 19, 1883 ..... $4,626 75
On general mortgage coupons.

No. 3272.

Elizabeth C. Stokes, commenced February 15, 1883. Judgment by default, April 19, 1883 ..... $4,626 75
On general mortgage coupons.

No. 3273.

Helen M. Juilliard, commenced February 15, 1883. Judgment by default, April 19, 1883 ..... $4,626 75
On general mortgage coupons.

No. 3274.

Edward M. Barnes, commenced February 15, 1883. Judgment by default, April 21, 1883 ..... $1,419 83
On general mortgage coupons.

No. 3276.

William Breck, commenced February 15, 1883. Judgment by default, April 18, 1883 ..... $3,705 52
On general mortgage coupons.

No. 3277.

William Clarke, commenced February 15, 1883. Judgment by default, April 17, 1883 ..... $4,884 80
On general mortgage coupons.

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No. 3278.

R. K. Dow, commenced February 15, 1883. Judgment by default, April 17, 1883 ..... $4,528 48
On general mortgage coupons.

No. 3279.

Ira Colby, commenced February 15, 1883. Judgment by default, April 17, 1883 ..... $3,277 43
On general mortgage coupons.

No. 3280.

Henry N. Sheldon, commenced February 15, 1883. Judgment by default, April 21, 1883 ..... $4,952 24
On general mortgage coupons.

No. 3281.

Henry Sanford, commenced February 15, 1883. Judgment by default, April 17, 1883 ..... $616 60
On general mortgage coupons.

No. 3284.

L. Levy, commenced February 22, 1883. Pending.
On general mortgage coupons.

No. 3285.

G. T. Bonner, commenced February 26, 1883. Judgment by default, April 17, 1883 ..... $616 60
On general mortgage coupons.

No. 3367.

Charles Moran, commenced March 27, 1883. Judgment by default, April 11, 1883 ..... $4,867 72
On general mortgage coupons.

No. 3486.

W. B. Miller, commenced July 6, 1883. Judgment by default, October 24, 1883 ..... $782 25
On general mortgage coupons.

No. 3487.

W. A. Goodwyn, commenced July 6, 1883. Judgment by default, October 24, 1883 ..... $1,172 36
On general mortgage coupons.

No. 3488.

Thomas Stokes, commenced July 6, 1883. Judgment by default, October 24, 1883 ..... $571 86
On general mortgage coupons.

83 No. 3493.

F. H. Cossitt, commenced July 9, 1883. Judgment by default, November 10, 1883 ..... $9,461 55
On 10 per cent. preferred bonds and coupons.

No. 3494.

Simon Borg, commenced July 9, 1883. Pending.
On general mortgage coupons.

No. 3495.

Amos R. Eno, commenced July 9, 1883. Judgment by default, November 10, 1883 ..... $58,945 62
On 10 per cent. preferred bonds and coupons.

No. 3496.

Henry Talmadge, commenced July 9, 1883. Judgment by default, October 24, 1883 ..... $3,574 17
On 10 per cent. preferred bonds and coupons.

No. 3507.

W. G. Wheeler, commenced August 4, 1883. Judgment by default, October 24, 1883 ..... $4,891 20
On general mortgage coupons.

No. 3508.

William Breck, commenced August 4, 1883. Judgment by default, October 24, 1883 ..... $3,791 88
On general mortgage coupons.

No. 3509.

John L. Farwell, commenced August 4, 1883. Judgment by default, October 24, 1883 ..... $3,302 76
On general mortgage coupons.

No. 3545.

F. H. Cossitt, commenced September 29, 1883.
On general mortgage coupons.
Defense—*ultra vires*—and no consideration.
Pending.

No. 3546.

Helen M. Juilliard, commenced September 29, 1883. Judgment by default, October 24, 1883 ..... $3,057 00
On general mortgage coupons.

No. 3547.

Elizabeth C. Stokes, commenced September 29, 1883. Judgment by default, October 24, 1883 ..... $3,057 00
On general mortgage coupons.

84 No. 3548.

George E. Dodge, commenced September 29, 1883. Judgment by default, October 24, 1883 ..... $2,486 36
On general mortgage coupons.

No. 3549.

E. W. Barnes, commenced September 29, 1883. Judgment by default, October 24, 1883 ..... $937 48
On general mortgage coupons.

No. 3550.

A. D. Juilliard, commenced September 29, 1883. Judgment by default, October 24, 1883 ..... $3,057 00
On general mortgage coupons.

No. 3551.

Mary C. Dodge, commenced September 29, 1883. Judgment by default, October 24, 1883 ..... $3,057 00
On general mortgage coupons.

No. 3563.

W. B. Miller, commenced October 11, 1883. Judgment by default, October 24, 1883 ..... $815 20
On general mortgage coupons.

No. 3565.

George N. Farwell, commenced October 13, 1883. Judgment by default, November 16, 1883 ..... $3,559 57
On 10 per cent. preferred bonds and coupons.

No. 3592.

Henry N. Sheldon, commenced November 21, 1883.
On general mortgage coupons and coupons ten per cent. Preferred mortgage.
Pending.

Nos. 3656 and 3657.

L. Salinger, administrator, commenced February 8, 1884.
Two suits for damages.
Dismissed.

No. 3696.

Dow, Matthews, & Moran, trustees, commenced March 20, 1884.
Action at law for possession of railroad under mortgage.

Amount of Judgments.

On general mortgage coupons			$107,479 64
On preferred mortgage coupons			75,640 31
Total judgments on coupons			$183,119 95
85 Russell Sage judgment			125,921 13
Decree on mortgage to State	$261,456 27		
Trustees' allowance	15,080 87		
Counsel fees	14,500 00		
Costs	295 45		
			291,332 59
Total judgments			$600,373 67

Suits in Chancery.

In addition to the foregoing suits at law the following suits in chancery have been brought against said railroad company:

No. 469.

John Overton, trustee, commenced March 7, 1882.

Suit by Overton, as trustee of Brinkley, to compel issue by railroad company of $1,500,000 deferred stock of the company.

Defense—That contract was *ultra vires* and without consideration.

Pending—Decree for complainants, April 24, 1884, and reference to master.

No. 487.

R. K. Dow, Watson Matthews, and Charles Moran, trustees commenced April 28, 1882.

Bill for trustees to be subrogated to the lien of the State of Arkansas upon a decree to foreclose a mortgage to said State upon said railroad, which decree was paid by said trustees to protect their "*cestui que trusts.*"

Defense—No subrogation in equity; bonds represented by plaintiffs were "*ultra vires*" and without consideration.

Decree, May 14, 1883—That trustees be subrogated to lien of State of Arkansas and that defendant pay said debt, amounting to $261,456.27, and that said road be sold to pay said debt. Allowed by decree to trustees for services, $15,080, and for counsel fees, $14,500. Total decree, besides court costs, $291,036. Case appealed to the Supreme Court of the United States and decree superseded May 14, 1883.

No. 528.

Equitable Life Association *et al.*, commenced April 10, 1883.

Bill to foreclose what is known in this case as the "ten per cent. preference mortgage" of May 1, 1877. Consolidated with No. 543 (next following case), and decree of foreclosure, April 4, 1884.

86 No. 543.

R. K. Dow and Watson Matthews, trustees, commenced June 26, 1883.

Bill sets up ten per cent. preference mortgage of May 1, 1877, and bonds secured thereby; prays for receiver and that bonds — paid from earnings of road, or for foreclosure and sale of road. Plea, other suits pending—overruled. Decree, April 4, 1884, for foreclosure and sale. Appeal to Supreme Court and supersedeas, April 26, 1884.

No. 544.

G. T. Bonner, commenced June 26, 1883.

Sets up ten per cent. preference mortgage of May 1, 1877; also general mortgage of May 2, 1877; that complainant is owner of coupons of general mortgage bonds, and has recovered judgment on them; that said judgment is unsatisfied; that the bonds and many coupons are unpaid; that property is incumbered to its full value. Prays for receiver to take possession and pay judgment from net earnings, or that property be sold subject to liens. Defense, bonds "*ultra vires*" and without consideration. Bill amended and defense alleged to be *res adjudicata*.

Nota Bene.

By order of this court December 6, 1883, the twenty-one suits of following numbers and names of complainants, of like character with last above, No. 544, were ordered consolidated with said number 544, to wit:

No. 545, William M. Chamberlain.
No. 546, William Clark.
No. 547, Martha L. Dow.
No. 548, H. E. Bailey.
No. 549, W. B. Miller.
No. 550, William Breck.
No. 551, Elizabeth C. Stokes.
No. 552, Henry N. Sheldon.
No. 553, Mary C. Dodge.
No. 554, Ira Colby.
No. 555, Helen M. Juilliard.
No. 553, R. K. Dow.
No. 557, Charles Moran.
No. 558, George E. Dodge.
No. 559, George Dow.
87 No. 560, E. W. Barnes.
No. 561, Henry Sanford.
No. 562, F. H. Cossitt.
No. 563, John L. Farwell.
No. 564, A. D. Juilliard.
No. 565, W. G. Wheeler.

No. 603.

Robert K. Dow, Watson Matthews, and Charles Moran, commenced February 12, 1884.

Recites all previous mortgages and litigation and organizations of the railroad, prays for receiver until final decree, and, upon final decree, that complainants be put in possession as trustees under mortgage of May 2, 1877.

Suit still pending.

Report. Is this Proceeding Collusive?

Upon the question of collusion the master finds the following facts:

On June 20, 1882, the defendant executed its note for $115,479.03, payable to the order of Jay Gould, president of the Missouri Pacific Railway Company, on demand, being the note upon which the judgment was recovered on which this proceeding is founded. On the same day, at the city of New York, this note was indorsed by the said Gould, as president, to the complainant.

On the same day the complainant writes to Governor Brown, the general attorney of defendant, at St. Louis, to employ counsel for him at Little Rock, to enforce his claim against defendant. On the twenty-second of June, the present attorney of record for complainant was retained by said Governor Brown for said Sage.

And on the twentieth of June, the day of the execution of said note at New York, R. S. Hayes, vice-president of defendant, telegraphs from St. Louis to E. K. Sibley, the then general manager and a director of defendant at Little Rock, that the president of
88 defendant would call a meeting of the directors of defendant, at St. Louis, on June twenty-second.

On June 21st the president of defendant telegraphed from New York to J. W. Goodwin, secretary of defendant, at Little Rock, to call a meeting of directors for June 22, at St. Louis.

On June 20 or 21 E. K. Sibley, the general manager of defendant, was notified by B. C. Brown, counsel for defendant, that a bill would be filed for a receiver and that he would probably be appointed receiver.

On June 22d a directors' meeting of defendant was held at St. Louis, Missouri; present, three directors, who were also its officers, the vice-president, general manager, and land commissioner.

At which meeting a resolution was adopted reciting that the defendant was indebted to the complainant by notes $10,000, and the said note of June 20 for $115,479.03, and that complainant "demands judgment" (not payment); that it will save costs and expenses to confess judgment, authorizing the counsel for the company to confess judgment, and directing the secretary to at once make out a copy of the resolution for the counsel of the company; and there being no other business, the meeting adjourned.

That this directors' meeting was thus suddenly called by telegram on a day's notice for the sole purpose of authorizing this confession of judgment.

That the amount of costs saved by this confession of judgment, if any, could not exceed ten or fifteen dollars.

That judgment could not have been obtained until several months later in ordinary course of law.

That a coupon of the general mortgage would mature in six days after this judgment was confessed, which coupon it would be defendant's duty to pay.

That on the twenty-third day of June, the day before complainant's judgment was confessed, William Black, of the county of Monroe, State of Arkansas, executed a power of attorney to B. C.
89 Brown (counsel for defendant) to sign his (Black's) name to E. K. Sibley's bond as receiver, which said Brown did on the next day.

That on the twenty-fourth day of June the defendant, by its counsel, B. C. Brown, in pursuance of said resolution, confessed the judgment in favor of complainant in this court, upon which this proceeding is founded, and on the same day.

That on the same day complainant filed his bill in the chancery court of Pulaski county, Arkansas, for a receiver of defendant upon the said judgment that day recovered in this court, said defendant, by its said counsel, being present, waiving notice and consenting thereto. A receiver was appointed over defendant's property on said day with very full powers and directions, said receiver being the general manager of defendant.

That the bill in this clause was prepared the evening before the judgment on which it was based was recovered.

That B. C. Brown, counsel for defendant, saw the complainant's bill before it was filed.

That said bill was prepared by complainant's counsel from a memorandum furnished him by a person whose name he declines to give.

That complainant's counsel was informed at the time the judgment was rendered that no objection would be made to the appointment of a receiver.

That counsel for defendant suggested the name of defendant's general manager as receiver, and he was appointed by consent.

Counsel for complainant states, in regard to the order for the appointment of a receiver, "The draft furnished the clerk was drawn by B. C. Brown; we conferred about the order, and I left it to him after that to prepare the order for the clerk."

That F. A. Marquand, president of defendant, says in his affidavit herein that defendant had filed what is known as the "New York bill" to have the bonds issued by defendant declared
90 void; that certain coupon holders of said bonds had brought actions on their coupons, and "that in order to prevent the levy of such executions, the defendant company consented to the appointment of a receiver until its bill aforesaid could be heard;" thus showing the *quo animo* of the whole proceeding to be to delay the creditors of defendant.

It will be observed (by the report herein upon suits brought) that no suits were commenced upon coupons until October 2, 1882—

more than three months after the confession of judgment and appointment of receiver.

That on June 27, 1882, a few days after receivership, E. K. Sibley resigned as a director of defendant.

That about said time B. C. Brown tendered his resignation as a director.

That about October 2, 1882, John W. Goodwin, secretary of defendant, at the suggestion of said receiver and general manager, tendered his resignation of his position as secretary, in order that process might not be served on defendant. Said resignation was not accepted.

That complainant, with Jay Gould and H. G. Marquand, hold title in trust to pretty much all the stock of defendant; that said trust is for the St. Louis, Iron Mountain and Southern Railroad Company, the stock of which last-named company is very nearly all owned by the Missouri Pacific Railway Company; that said complainant and Gould and Marquand are very large owners of Missouri Pacific railway stock, which shows complainant to be largely interested in the stock of defendant.

That substantially all of the stock of defendant is owned by the Missouri Pacific Railway Company.

That defendant is managed and controlled by the Missouri Pacific Railway Company.

That complainant herein is a director of and member of the executive committee of the Missouri Pacific Railway Company.

That complainant was present at the meeting of the execu-
91 tive committee of the Missouri Pacific Railway Company which passed the resolution to sell him the $115,000 note of defendant, on which this proceeding is founded, for fifty cents on the dollar.

That said meeting of said executive committee was held on June 20, 1882, the same day that said note was executed and transferred to complainant.

That the transaction by which complainant acquired said note was a written proposal by him to the Missouri Pacific Railway Company to purchase the note for fifty cents on the dollar, payable in ninety days, and not on demand, as stated by complainant in his deposition, and an acceptance of said proposition by a resolution of said executive committee and indorsement of the note by the president of said company to complainant, both said proposal and acceptance being on the same day of the execution of said note, June 20, 1882.

That a year and eleven months, or thereabouts, have elapsed since the date and alleged sale of said note to complainant, and that he has not paid anything, either principal or interest, on or for said note, and has not given his note or other obligation therefor.

That defendant, on March 6 and 10, 1884, paid to the Missouri Pacific Railway Company $16,036.05 on account of complainant's judgment against defendant on said note.

That on April 12, 1884, complainant had not received or collected anything on account of his said judgment on said note.

That complainant knew this judgment of his had been offered (X Int. 137 to 141) by Mr. Hayes, vice-president of defendant, to the bondholders of defendant in compromise propositions, and that he had authorized said offer.

That defendant, through the Missouri Pacific Railway Company, has paid to S. R. Cockrill, the counsel for complainant, $400 for services in this cause, as per "Exhibit X," in connection with "Exhibit Z^M," and has paid for printing the brief of complainant in this cause, as per "Exhibits Z^S and Z^M."

92 And has paid $250 to J. M. Rose, solicitor for Equitable Life Assurance Society of America in its suit against defendant, as per "Exhibits Z^O and Z^M."

And has paid said J. M. Rose's traveling expenses in said cause to Kansas City to continue receivership herein, as per "Exhibits Z^P and Z^M."

And has paid for printing brief of Equitable Life Association in case against defendant, as per "Exhibits Z^R and Z^M."

It is attempted to be shown that the fee paid to Cockrill should not have been presented to defendant for payment, and that it is a charge against complainant; but it was presented and was, with the four last above items, approved by the president of defendant as correct, and was paid by it, and was included in a voucher, "Z^M," of some $10,000 for legal services, expenses, and printing on both sides of this cause and both sides of the case of Equitable Life Association against said defendant, and costs in other causes connected with this litigation.

And it may be remarked this $10,000 of legal expenses were paid by the Missouri Pacific while defendant was in hands of the receiver, and the bills were not presented to and paid by defendant until after the receiver was discharged, perhaps because they would not bear the inspection of a master, who should pass the receiver's accounts.

And further finds that the coupons purchased by H. G. Marquand (see his deposition) and testified to be included in the $115,000 note were purchased by him, not as representing the defendant, but, as he states, as an "outsider," and sold to the Missouri Pacific Railway Company.

That the coupons for January, 1882, interest have not yet been filed in the office of the company at Little Rock, as has been customary. It is alleged these coupons are in the office of the assistant treasurer at St. Louis; that the treasurer's office is in New York, and therefore the coupons are not filed in the office at Little Rock.

93 That the note for $115,000 was payable on demand and was never protested.

That complainant did not take interest enough in his suit for $125,000 to remember the name of his attorney in the suit or of the receiver, or whether his purchase was on demand or on ninety days.

That Russell Sage has never paid anything upon the said $115,000 note, and is not the beneficial owner of the same and the judgment based thereon, upon which this suit is founded.

That the receiver in this cause was discharged by the circuit judge of this circuit upon his own motion, no party asking therefor, upon the ground that this proceeding was collusive and intended to hinder and delay the creditors of defendant, and this though elaborate briefs were filed by defendant and by the Equitable Life Assurance Society and complainant urging the continuance of the receivership.

That the receiver's accounts herein show that defendant's road earned more than enough money to have paid all its operating expenses and the interest on all of its bonds while in receiver's possession.

From the foregoing facts and others contained in the testimony and pleadings in this and other causes cognate hereto, and to which the master was directed to refer and which are not specially found, has this proceeding been collusive between complainant and defendant?

Was this suit brought for the purpose of collecting the money from defendant? The complainant knew at the time he bought this note, as he testifies, that the defendant was in embarrassed circumstances and bought the note for fifty cents on the dollar. If it was a regular business transaction why should the note have been made payable on demand; and why was it not protested to save the indorser—the Missouri Pacific Railway Company—a fully able and solvent party? If money was desired, why was not the
94 note negotiated on the street, as it well might have been (bearing six per cent. interest, as it does) with so solvent an indorser? Why did not complainant, at any time during the receivership, apply to the court for the application of funds in the receiver's hands to the payment of his debt?

Why did he sit still and see the receiver applying the money of defendant to very large amounts, more than enough to pay his debt, to the betterment of a property in which he swears he has no interest or ownership? There were frequently cash balances in receiver's hands, enough to pay this judgment, but no application was made therefor. The course pursued by complainant is utterly inconsistent with any desire on his part for the collection of his debt, and the master finds this suit was not brought with that view.

Is this an adversary proceeding? The defendant with great haste, the day this note was executed, proceeded to call a meeting of its directors for the second day after the execution of the note, by telegram, the sole and only purpose of which was to confess judgment to the complainant on this note, and on the second day after, by said meeting, authorized the confession of judgment.

And on the third day after the execution of the note confesses the judgment and consents to the appointment of a receiver of its property, though the costs would have been no greater to have allowed complainant to take judgment at the earliest day the law would give it, some four months later. What interest of defendant was advanced by this early judgment and receivership? Why this haste of defendant to put its property out of its control? The complainant was not in need of money; he made no effort to collect his debt, and the defendant, though in receipt of large sums of money

by its receiver, did not offer to pay complainant's debt pursuant to the judgment, but by its receiver spent more than money enough to pay this debt in betterment of its property.

95 It is also shown that before this premature judgment was obtained, three days before, the then general manager of defendant was notified by the counsel of defendant that a bill for a receiver would be filed, and that he would probably be appointed receiver. The counsel for complainant was retained by the general counsel for defendant, or of the Missouri Pacific Railway Company, which amounts to the same thing. The bond for the receiver was prepared by counsel for the company, and was signed by the counsel for the company as attorney-in-fact for one of the sureties, by virtue of a power of attorney executed the day previous to the rendition of the judgment.

It is therefore found that the proceedings herein are and were not adversary in their character.

That the defendant took no steps in any instance to defend itself from the attacks of complainant, but continued assiduously, through medium of its officers, at all and every stage, to assist the complainant in obtaining an immediate judgment and receivership, and by its counsel made every effort to continue the receivership and made no effort to pay complainant's debt, and complainant made no effort to collect his debt, though the means of payment were abundant, show a common purpose and design, acted upon throughout by both complainant and defendant, to the same end, of keeping defendant's property away from its creditors.

It seems that it was the intention of the defendant to use, and that it has used, the receivership as a shield to protect itself against its creditors, and that this was the declared purpose of defendant as shown by the affidavit of its president, Marquand, who states in words that such was its intent.

But it is said defendant acknowledged service on various suits and consented to judgments thereon; but this action was not taken until February 15, 1883, some eight months after the receivership; but in any event the creditors, even after judgment, were

96 powerless, so long as the property of defendant was in the grasp of the receiver and protected by the court, as the defendant meanwhile was spending the money that should rightly have been paid to them in betterment of its property.

We find in "Freeman on Judgments, section 250," quoting Lord Wedderburn and Lord Brougham, in speaking of collusive suits, says the requisites of a valid judgment are "a judicial determination of a cause agitated between real parties upon which a real interest has been settled. In order to make a sentence there must be a real interest, a real prosecution, a real defense, and a real decision. Of all these requisites not one takes place in a fraudulent or collusive suit. There is no judge, but a person invested with the insignias of a judicial office is misemployed in listening to a fictitious cause proposed to him. There is no party litigating, there is no party defendant, no real interest brought in question."

So here it is apparent from the record in this case, as above found, that this suit has been conducted on both sides by the defendant, its servants, and agents; that there is and has been no real controversy, no real interest or question to be settled or decided between the parties. The complainant has never placed himself in an attitude antagonistic to defendant; has never demanded the rights nor sought the enforcement of legal rules in his behalf as against the defendant, but has suffered his judgment and receivership to lie idle and unenforced for the purpose of defeating the creditors of defendant and in the interest of defendant, not in the interest of complainant; has not sought to collect his debt until other creditors of defendant intervened in the suit.

It is alleged that the debt of complainant and the judgment of law thereon are for a valuable consideration, and therefore that this suit is not collusive or fraudulent. Even admitting that to be true, and that it would be a good answer if the defendant was
97 claiming the fund, still, as to creditors who have intervened and who have been delayed and hindered by this proceeding, it is no valid response.

It is held in Beattie *v.* Pool, 13 S. C., 379; "A judgment confessed with the intent to hinder and delay creditors is fraudulent, though based on a valuable consideration."

And it is distinctly alleged by the president of defendant, in his affidavit, that the receivership herein was consented to in order to hinder and delay defendant's judgment creditors.

And counsel for defendant have argued in their briefs herein for a continuance of the receivership upon the ground that defendant would be protected from its judgment creditors thereby.

It seems apparent that the transaction between the complainant herein and the Missouri Pacific Railway Company (who is owner of defendant) by which complainant acquired the note of defendant upon which this suit is based, was not a legitimate, regular, business transaction, by which the complainant became possessed absolutely and in good faith, as the unqualified owner in his own right, of the note of defendant. A perusal of complainant's deposition and the evasive and qualified answers to the interrogatories therein show to the least observant reader that there was something behind, beyond, and connected with this transaction further and more than appears upon the face of the matter testified to, and which, if susceptible of explanation, might have been elucidated by the complainant or persons whom he could have called as witnesses, but which he has failed to do, especially so as he states he knew the *bona fides* of this transaction was called in question.

He ostensibly purchased this note with the unqualified indorsement on its back of the Missouri Pacific Railway Company, a fully responsible party, for fifty cents on the dollar, payable in
98 ninety days (he swears on demand). A year and seven months have elapsed since by the terms of the contract for its purchase it should have been paid for, and yet he has paid no part of the money due on the purchase nor any interest thereon, and has not given his note or other obligation therefor.

It appears by vouchers "Exhibits Z^K and Z^L" that on March 6 and 10, 1884, the defendant paid to the Missouri Pacific Railway Company $7,036.05 and $9,000 to be placed to the credit of the Sage judgment, and as Mr. Sage, on the twelfth of April, 1884, swears he has never received a cent on his judgment, it may properly be inferred, under the circumstances of this case, that the Missouri Pacific Company kept that money as rightfully belonging to them as owners of the judgment, and not to Sage.

Under these circumstances, can the complainant be regarded as the owner of this note and judgment in good faith?

It seems apparent from the complainant's own testimony, coupled with the other facts in the case, that he is not and was not the owner of the note and judgment in question in good faith.

And that the proceedings between him and the Missouri Pacific Company, which company is the substantial owner of defendant, by which he acquired said note, was a mere juggle to lay a foundation for a judgment and receivership of the defendant for the purpose of delaying defendant's creditors, and perhaps for other purposes mentioned in the pleadings.

It seems apparent that this note was acquired by complainant for the purpose of bringing this suit, knowing no court would appoint a receiver on the $10,000 claim he then held.

The reason assigned by complainant for the purchase of this note to aid him in the collection of his $10,000 claim is exceed-
99 ingly attenuated, that he bought a claim of $115,000 against an embarrassed party in order to collect a $10,000 claim against the same party.

The master, in consideration of the foregoing, finds that the judgment of Russell Sage and the proceedings by him in this cause have been fraudulent and collusive with the defendant; that this cause was instituted in collusion with the defendant for the purpose of hindering and delaying the creditors of defendant, and that defendant was a party to the collusive proceedings herein for the same purpose.

Report upon Distribution of Fund.

There are before the master as claimants to the fund the complainant, Russell Sage, the defendant, creditors holding judgments on general mortgage coupons, creditors holding judgments on preferred mortgage bonds and coupons, and the trustees of both the general and preference mortgages.

Upon these the master finds that the claim of defendant to the fund, while its creditors by mortgage and judgment are here asking for it, must be disallowed for reasons which are too obvious to need recital.

The claim of Russell Sage, the complainant, as against other claimants, must also be disallowed—first, because of the fraudulent and collusive character of his suit and judgment; second, because he is not the owner of the judgment on which this suit is based, except to the amount of about $10,000 and interest, and as to this

latter, because of his collusion herein, he must be postponed to all other parties who are claiming the fund, who come with clean hands and *bona fide* claims.

100 This narrows the issue to the claims of the judgment creditors on coupons and bonds of both mortgages and the trustees in both mortgages.

In determining the priority of parties claiming a fund in the hands of a receiver and earned by him it becomes necessary to consider the nature of a receiver's possession. A receiver is an officer of the court; his possession is the possession of the court. He represents all the parties interested in the property, plaintiff, defendant, mortgagee, mortgagor, judgment creditors, lien creditors, etc.; he represents the property. The earnings collected by him are to be held pending the litigation, that one party may not acquire any interest in or to or lien upon them in preference to any other party until the rights of the several parties claiming the property and its incomes can be adjudicated. It is the purpose of the appointment of a receiver to prevent the disposition of the property or the attaching of liens thereon pending the litigation. No lien can be obtained upon a fund in the hands of a receiver earned or accrued subsequent to his appointment. It will be disposed of according to the rights and equities of the parties existing at the date of the appointment of the receiver.

The possession of the court, through its receiver, closed the race of diligence between the parties; they then pass under the wire and await the decision of the judges.

In High on Injunctions, sec. 135: "A receiver being appointed primarily for the benefit of all parties in interest, his possession will be treated as the possession of the party who shall be ultimately determined to be entitled thereto, and when the question of right is finally determined the possession of the party prevailing becomes exclusive throughout the whole period by relation to the date of the receiver's appointment."

Judgments are not a lien upon personal property; certainly they are not liens upon property "*in custodia legis.*" Hence the judgments obtained by the coupon holders intervening in this case can

101 give them no stronger claim upon the fund than they had previously, especially so as their suits were all commenced and judgments obtained while the property was in the hands of the court's receiver. Coe *v.* Col., Piq. & Ind. R. R., 10 Ohio State, 374. And as the right of the successful party to the fund has relation back to the appointment of the receiver the date or priority of filing claims to the fund can have no force or effect in establishing a priority of right to the fund. Hence the fund must be distributed according to the superior equities existing at the date of the receiver's appointment. No suits or judgments on coupons were then in existence.

The cases of Galveston R. R. *v.* Cowdrey, 11 Wall., 459; Gilman *et al. v.* Illinois & Mississippi Telegraph Company, 91 U. S., 603, and American Bridge Company *v.* Heidelbach, 94 U. S., 798, have been urged upon the master as giving some right or equity to the fund

in favor of judgment creditors; but it seems those cases have no application here, because there the judgment creditors had established a lien upon or right to the earnings of the company, the rents and profits of the property while the same were in the custody or under the control and at the disposition of the company; and those cases are bottomed on the fact that the revenues attached were at the disposal and under the control of the company, and therefore a lien could be placed upon them. Not so here. In this case the fund has been earned by the court through its receiver. It has never been under the control or in possession of defendant, but has always been in custody of the court.

And in custody for what purpose? Why, for the purpose of being paid to the persons who shall ultimately be entitled thereto.

We have, then, the holders of past-due coupons and bonds of preference mortgage and holders of coupons of general mortgage and trustees of both mortgages claiming the fund.

102 Now, assuming that no lien on or superior right to the fund was acquired by the coupon holders, who commenced their actions and took their judgments pending the receivership, their duty being to apply to the court having the fund in custody, not to seek a priority by judgment in another forum, what is the equity to priority of payment between these parties?

The bond and coupon holders of the general mortgage took their bonds with an indorsement on them that they were subject to the lien of the preference mortgage bonds and coupons. It seems, therefore, that they cannot in equity now claim to be paid from the fund in priority to the preference mortgage bond and coupon holders; and as the fund is not sufficient to satisfy the preference mortgage the claims of the general mortgage coupon holders are disallowed.

We have, then, remaining the coupon and bondholders of the preference mortgage who have obtained judgments claiming the fund as against the trustees in said preference mortgage.

Shall the fund be awarded to pay in full a part of the bond and coupon holders of this preference mortgage, leaving their co-bondholders but a small fraction of their debt when all are equally secured by the same mortgage, or shall the fund be awarded to the trustees of the preference mortgage, to be distributed *pro rata* upon the bonds and coupons of said mortgage?

It is said that equity delights in equality. These coupon holders who have obtained judgments have no lien upon this fund by reason of their judgments. Why should they be preferred to their co-bondholders when the trustees are here asking for the fund for equal distribution among all?

With these views the master reports that the fund, after payment of taxed costs and allowances already made to the receiver of $4,116.69 and $1,000 to counsel for receiver and the com-

103 pensation of the master herein, be paid over to Robert K. Dow and Watson Matthews for distribution among their *"cestuis que trust."*

Requests of Defendant for Special Findings of Fact.

On the eighth day of May, 1884, defendant filed with the master its request for twenty-three special findings of fact and four special findings of law, which requests are hereto attached, marked "Exhibit Z⁸."

These requests are not upon any issues referred to the master, and he has some misgivings as to the propriety of making any findings thereupon, but considers that no harm will be done by finding any facts disclosed by the record, and therefore finds upon them as follows:

First. Upon the first request the record does not show that any of the income of defendant during the receivership was paid to any of the persons named or that they received any immediate benefit from the receivership except in its protection of defendant from its creditors and the expenditure of the income of defendant in betterment of its property.

Second. The second request the master finds as stated.

Third. To the third request the master finds the moneys received by the receiver were largely applied to the betterment of the property and not diverted therefrom, but were attempted to be, and were diverted from payment of defendant's debts.

Fourth. The fourth request seems to be justified by the record, so far as the master now recalls.

Fifth. The fifth request is found as stated.

Sixth. The sixth request the master declines to find, for the reasons stated in his report above and because the record and testimony is not clear upon this point.

Seventh. The seventh request is believed to be substantially correct.

104 Eighth. The eighth request is substantially correct as far as it goes, but there should be added to it as interveners the holders of bonds and coupons and trustees of preference mortgage.

Ninth. The ninth request is evidenced by the affidavit of B. C. Brown, Esq., and it is not denied or disproved, as far as the master recollects, and is therefore found as stated, except that the bondholders would seize the rolling stock and personal property on execution.

Tenth. The tenth request is found as stated.

Eleventh. Upon the eleventh request the master finds such a resolution was passed February 15th, 1883, at a stockholders' meeting.

Twelfth. The twelfth request is found as stated, except that judgment was not rendered in one of the suits.

Thirteenth. The thirteenth request is found as stated.

Fourteenth. The fourteenth request is found as stated, except that judgment was not rendered in two of said suits.

The fifteenth, sixteenth, seventeenth, and eighteenth requests are found as stated.

Nineteenth. Upon the nineteenth request the master does not know what the trustees and bondholders were willing to, but finds they took no steps to put an end to the receivership.

Twentieth. The twentieth request is found as stated.

Twenty-first. Upon the twenty-first request it is found counsel for interveners made no effort to discontinue the receiver, and consented to a continuance of the cause through the summer of 1883, which had the practical effect of continuing the receivership.

Twenty-second. The twenty-second request is refused, for the reason that all of defendant's creditors were hindered and delayed by the receivership.

Twenty-third. The twenty-third request is also refused, because the receivership was used by complainant and defendant in collusion with each other to hinder and delay creditors.

105 *Requests of Defendant for Special Findings of Law.*

Upon the defendant's request for the four findings of law the master declines to find each and every of them, for the reasons stated in this report.

Report on Reading Report and Exceptions Thereto.

The master, having prepared the foregoing report on the third day of May, 1884, gave notice to the respective parties, as appears by "Exhibit Z^{II}" hereto, to come into the master's office on the twelfth day of May, 1884, and hear the reading of said report, and then and there make their objections and take their exceptions thereto, if any they had; and on the twelfth day of May, 1884, the respective parties appeared in the master's office, and said report was read; and thereupon it was agreed that the final hearing on the master's report in his office be continued until May 22, 1884, when and where exceptions may be taken thereto, and that said report be printed and the expense thereof be paid from the fund in this case, as appears by "Exhibit Z^{I}" hereto.

And on the nineteenth day of May, 1884, came into the master's office the complainant herein, by S. R. Cockrill, Esq., his solicitor, and filed herein his five exceptions to the foregoing report, which exceptions are hereto attached, marked "Exhibit Z^{V};" and on the same day also came the defendant, by B. C. Brown, Esq., its solicitor, and filed herein its twelve exceptions to said report, which exceptions are hereto annexed, marked "Exhibit Z^{V}."

And the master, after a careful consideration of each of said exceptions, finds, for the reason set out in said report, that each and every of said exceptions should be overruled and denied, and the same are therefore overruled.

It may be remarked in regard to defendant's exception No. 5 and complainant's exception No. 4: The testimony shows that the coupons which are alleged to have formed the basis of complainant's debt have never been filed in the company's office at Little
106 Rock, but that they are in the possession of the general auditor of Missouri Pacific Railway Company, and that a part of them have not been canceled and are therefore still outstanding obligations of the defendant. (See Sibley's deposition, Exhibit M, and letter, Exhibit E to A. H. Calef's deposition in "Exhibit W"

hereto; also deposition of H. G. Marquand, part of "Exhibit W," where he states his purchase of a part of the coupons which entered into complainant's note and judgment was made as "an outsider" and not representing defendant, and were sold to Missouri Pacific Railway Company.) No reason is shown why these coupons should not be canceled and filed in the home office of the company, within the jurisdiction of this court. With this evidence in view and unexplained, the said two exceptions seem to the master not well taken, and he cannot find said debt to be *bona fide*.

All of which is respectfully submitted by—

CHARLES P. REDMOND, *Master*.

May 19, 1884.

Supplemental Report.

MAY 22, 1884.

On the twelfth day of May, 1884, the foregoing report was closed and time given until May 22, 1884, to file exceptions thereto. On May nineteenth exceptions were filed by both complainant and defendant.

And on May 20, 1884, the defendant, by its counsel, came into the master's office and tendered and filed the following paper, to wit:

In the Circuit Court of the United States for the Eastern District of Arkansas. In Chancery.

RUSSELL SAGE, Complainant,

versus

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant.

Before the master upon reference.

To the Hon. Charles P. Redmond, master:

Observing that in your report, so far as the same has been
107 prepared, you seem to doubt the validity and justice of the demand of the Missouri Pacific Railway Company against this defendant, this demand being the one which was assigned by the said Missouri Pacific Railway Company to the complainant and which formed a large part of the debt for which defendant confessed judgment in favor of complainant on June 24, 1882, and also noticing that you base part, if not all, of your doubt upon the fact that the coupons attached to the bonds of the defendant which matured January 1, 1882, and which were paid with the moneys borrowed by defendant from the Missouri Pacific Company were not returned to the office of the defendant at Little Rock, the defendant herewith presents to you the coupons so paid, duly canceled, and requests that you accept the same as part of the evidence in this cause, and that you return them with your report to the court, to the end that they may be further so canceled, if the court should deem further cancellation necessary, as to make it certain that they cannot again be used as a basis of a claim against defendant.

The defendant is interested in your finding in this behalf because it is its right and duty to show, when attacked, that the debt for which it so confessed judgment was just and due, and that its action in this behalf was honest and untainted with fraud.

In this connection defendant further asks your attention to the fact that during the progress of the taking of testimony before you upon this reference it, through its counsel, offered, if you considered it material, to establish the following facts by testimony:

1. That the office of the treasurer of the defendant is kept in the city of New York, and was kept there at the time the said money was borrowed and said coupons paid, and has been kept there at all times since.

2. That at the time said coupons were paid and at all times since the defendant has had an assistant treasurer, whose office has been and is kept at St. Louis, in the State of Missouri.

3. That said coupons were placed in the possession and surrendered to the treasurer of defendant, and that said coupons have always been in the possession of defendant and in the actual custody of its proper officers; also that you did not ask for such evidence, nor say that it was material or necessary.

Defendant again offers to furnish full, true, direct, and positive evidence and proof of these facts, and it now demands your judgment as to whether, the coupons being produced to you by defendant, such proof is necessary to establish the fact that the debt for which defendant so confessed judgment was at the time just and due.

And if you are of opinion that such evidence is necessary to establish such facts it asks that reasonable time be given it to adduce the evidence.

Respectfully,

B. C. BROWN,
For Defendant.

108 In regard to the statement of defendant's offers to prove certain facts, the master does not now recollect. It may have been as defendant alleges, but the master does recollect that he never, in any instance, declined to receive any testimony of any kind; that he did receive testimony from both sides after the sixty days allowed by the court had expired, and that defendant, at its own option, could at any time have introduced this testimony if it so desired.

If it is intended in this paper to refer to the action of the master on May 12, 1884, in erasing a part of his finding on the sixth request of defendant for a finding of fact it was then too late to introduce testimony, as the sixty days had expired and the master's report was prepared and was only kept open for the taking of exceptions to it as it then stood. The master regrets if defendant was misled by his action on that occasion, but this report will never be closed if parties can commence to take testimony anew every time a finding is made with which they are dissatisfied.

Whereupon the master finds that A. H. Calef was, on the twentieth day of June, 1882, the treasurer of defendant, and has been ever since that date, and that he resides in the city of New York.

That, upon the inspection of the records of said defendant, it appears that D. S. H. Smith was elected assistant treasurer of said defendant on February 15, 1883, but it does not appear that on June 20, 1882, the date of said note, or at any time previous to February 15, 1883, the defendant had an assistant treasurer at St. Louis, Missouri.

It does not appear in evidence when said coupons came to possession of any officer of defendant at St. Louis.

But it does appear in evidence on part of the defendant that said coupons, upon which the note on which this suit is based as alleged,

were sent to and were, on the eighteenth day of July, 1882, in
109 the custody of C. G. Warner, general auditor of the Missouri
Pacific Railway Company, at St. Louis, Missouri; that the general mortgage coupons were canceled, but that the preference mortgage coupons were not then canceled. (See Calef's letter in "Exhibit W.") Nor does it appear in evidence why these coupons, if they had been paid for by defendant's note to the Missouri Pacific Railway Company, should be sent to the general auditor of the Missouri Pacific Railway Company, at St. Louis, and not retained by the defendant's treasurer at New York, nor sent to the home office of the defendant at Little Rock. From which it appears that said coupons were not in defendant's custody on the eighteenth day of July, 1882, a month after the date of said note; that a part of them had not been canceled on the twentieth day of May, 1884.

It further appears in evidence that A. H. Calef, the treasurer of defendant, is also treasurer of the Missouri Pacific Company, and that D. S. H. Smith, assistant treasurer of defendant, is local treasurer of the Missouri Pacific Railway Company, at St. Louis.

The master states that on the twentieth of May, 1884, a package of coupons said to contain the coupons represented by said note were tendered to him by B. C. Brown, Esq., counsel for defendant, as evidence herein—the preference mortgage coupons in which package were not then canceled; which coupons the master declined to receive, as not justified by the terms of the reference herein, and because the master's office is not a proper place of deposit for such vouchers, and because the filing of same in master's office does not increase their weight as evidence herein.

It is deemed the fact that the coupons in question now at this time being in possession of defendant and now, at this recent date, being in proper custody—a part of them uncanceled—cannot affect

the *bona fides* of this transaction at its inception. The testi-
110 & 111 mony proposed can, therefore, not affect the main issue as to
the collusive character of this proceeding; the master therefore declines to open his report for further testimony; to all of which findings and conclusions of the master and to his refusal to open the case for further testimony the defendant at the time excepted, and his exception is here noted; which exceptions are overruled.

All of which is respectfully submitted by—

CHARLES P. REDMOND, *Master.*

May 22, 1884.

Exhibits A[1] to A[19] are filed in court, but not printed herein, because too voluminous and expensive. They are the schedules of receiver's disbursements.

EXHIBIT B 1.

Memphis and Little Rock Railroad Company (as reorganized).

Statement of Receipts from June 25 to 30, Inclusive, 1882.

1882.			
June 24.	To Memphis and Little Rock Railroad Company (as reorganized)—		
	For amount of cash balance this date turned over to E. K. Sibley, receiver for said company, under orders from the chancery court of Pulaski county, Arkansas		$31,957 76
June 30.	To receipts as follows from—		
	Agents and conductors	$16,279 37	
	Express department Memphis and Little Rock Railroad Company	614 45	
	United States (mail pay)	250 00	
	Sundry roads and persons	283 18	
	Mileage	145 59	
	Land department	100 00	
	Land notes	12 34	
			17,684 93
			$49,642 69

CREDIT.

June 30.	By balance to July, 1882, account	$49,642 69	

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

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EXHIBIT B 2.

Statement of Receipts for Month of July, 1882.

1882.			
July 1.	To balance from June 30, 1882		$49,642 69
July 31.	To receipts from—		
	Agents and conductors	$43,948 20	
	Express department Memphis and Little Rock Railroad Company	979 97	
	Southern Express Company	687 19	
	Coupon ticket account	3,093 55	
	United States (mail pay)	3,038 23	
	Reclamations	8 11	
	Sundry roads and persons	346 92	
	Interest and exchange	15 20	
	Land department	88 90	
	Land notes	160 00	
			52,366 27
			$102,008 96

CREDIT.

By disbursements in July, as per Exhibit No. 2		36,743 61
By balance charged to August, 1882, account		$65,265 35

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

EXHIBIT B 3.

Statement of Receipts for Month of August, 1882.

1882.			
Aug. 1.	To balance from July 31, 1882		$65,265 35
Aug. 31.	To receipts from—		
	Agents and conductors	$58,283 97	
	Express department Memphis and Little Rock Railroad Company	1,110 90	
	Southern Express Company	642 29	
	Coupon ticket account	989 23	
	Memphis and Little Rock Railroad Company (as reorganized)	2,708 76	
	Reclamations	725 26	
	Sundry roads and persons	848 97	
	Land notes	33 55	
			65,342 93
			$130,608 28

CREDIT.

Aug. 31.	By disbursements in August, as per Exhibit No. 3		63,248 68
	By balance to September, 1882, account		$67,359 60

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

114 EXHIBIT B 4.

Statement of Receipts for Month of September, 1882.

1882.			
Sept. 1.	To balance from August 31, 1882		$67,359 60
Sept. 30.	To receipts from—		
	Agents and conductors	$68,372 94	
	Express department Memphis and Little Rock Railroad Company	1,261 79	
	Southern Express Company	605 42	
	Coupon ticket account	5,768 50	
	Memphis and Little Rock Railroad Company (as reorganized)	85 49	
	Reclamations	152 10	
	Sundry roads and persons	709 23	
	Interest and exchange on land notes	4 91	
	Land notes	85 29	
			77,045 67
			$144,405 27

CREDIT.

Sept. 30.	By disbursements in September, as per Exhibit No. 4		72,966 42
	By balance to October, 1882, account		$71,438 85

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

EXHIBIT B 5.

Statement of Receipts for Month of October, 1882.

1882.			
Oct. 1.	To balance from September 30, 1883		$71,438 85
Oct. 31.	To receipts from—		
	Agents and conductors	$86,308 72	
	Express department Memphis and Little Rock Railroad Company	1,882 24	
	Southern Express Company	764 58	
	Coupon ticket account	4,663 43	
	Memphis and Little Rock Railroad Company (as reorganized)	29 69	
	Reclamations	33 24	
	Sundry roads and persons	466 43	
	United States (mail pay)	4,060 75	
	Mileage	24 27	
	Interest and exchange on land notes	94 40	
	Land department	461 60	
	Land notes	763 72	
			99,553 07
			$170,991 92

CREDIT.

Oct. 31.	By disbursements in October, as per Exhibit No. 5		115,296 90
	By balance to November, 1882, account		$55,695 02

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

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EXHIBIT B 6.

Statement of Receipts for Month of November, 1882.

1882.			
Nov. 1.	To balance from October 31, 1882		$55,695 02
Nov. 30.	To receipts from—		
	Agents and conductors	$116,529 63	
	Express department Memphis and Little Rock Railroad Company	1,650 10	
	Southern Express Company	1,124 66	
	Coupon ticket account	7,867 94	

Road expenses	1,298 62	
Reclamations	214 72	
Sundry roads and persons	1,586 09	
Land department	500 80	
Land notes	675 29	
Interest on land notes	112 10	
		131,559 95
		$187,254 97

CREDIT.

Nov. 30. By disbursements in November, as per Exhibit No. 6		100,830 19
By balance to December, 1882, account		$86,424 78

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

EXHIBIT B 7.

Statement of Receipts for Month of December, 1882.

1882.			
Dec. 1.	To balance from November 30, 1882		$86,424 78
Dec. 31.	To receipts from—		
	Agents and conductors	$103,190 80	
	Express department Memphis and Little Rock Railroad Company	2,338 05	
	Southern Express Company	1,162 55	
	Coupon ticket account	12,734 24	
	Road expenses	153 57	
	Reclamations	781 59	
	Sundry roads and persons	1,216 13	
	Mileage	1 45	
	Land department	2 75	
	Land notes	3,812 09	
	Interest on land notes	490 51	
			125,863 73
			$212,308 51

CREDIT.

Dec. 31. By disbursements in December, as per Exhibit No. 7		119,475 90
Dec. 31. By balance to January, 1883, account		$92,832 61

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

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EXHIBIT B 8.

Statement of Receipts for Month of January, 1883.

1883.			
Jan. 1.	To balance from December, 1882		$92,832 61
Jan. 31.	To receipts from—		
	Agents and conductors	$94,991 33	
	Express department Memphis and Little Rock Railroad Company	1,486 90	
	Southern Express Company	1,619 70	
	Coupon ticket account	14,303 67	
	United States (mail pay)	4,060 74	
	Reclamations	97 32	
	Sundry roads and persons	1,324 15	
	Mileage	2 84	
	Land notes	334 73	
	Interest on land notes	43 10	
			118,264 48
			$211,097 09

CREDIT:

Jan. 31.	By distributions in January, as per Exhibit No. 8		105,601 48
Jan. 31.	By balance to February, 1883, account		$105,495 61

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

EXHIBIT B 9.

Statement of Receipts for Month of February, 1883.

1883.			
Feb. 1.	To balance from January, 1883		$105,495 61
Feb. 28.	To receipts from—		
	Agents and conductors	$60,776 37	
	Express department Memphis and Little Rock Railroad Company	1,316 45	
	Southern Express Company	990 56	
	Coupon ticket account	16,288 07	
	Reclamations	89 57	
	Sundry roads and persons	790 63	
	Land notes	140 00	
	Interest on land notes	22 40	
			80,414 05
			$185,909 66

CREDIT.

Feb. 28. By disbursements in February, as per Exhibit No. 9			124,191 66
Feb. 28. By balance to March, 1883, account			$61,718 00

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

117 EXHIBIT B 10.

Statement of Receipts for Month of March, 1883.

1883.			
March 1. To balance from February 28, 1883			$61,718 00
March 31. To receipts from—			
Agents and conductors	$68,657 80		
Express department Memphis and Little Rock Railroad Company	1,241 50		
Southern Express Company	838 28		
Coupon ticket account	13,460 62		
Reclamations	378 58		
Sundry roads and persons	1,590 55		
Mileage	27 11		
Land department	80 00		
Land notes	361 00		
Interest on land notes	65 10		
			86,700 54
			$148,418 54

CREDIT.

March 31. By disbursements in March, as per Exhibit No. 10			100,040 96
March 31. By balance to April, 1883, account			$48,377 58

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

EXHIBIT B 11.

Statement of Receipts for Month of April, 1883.

1883.			
April 1.	To balance from March 31, 1883		$48,377 58
April 20.	To receipts from—		
	Agents and conductors	$71,165 32	
	Express department Memphis and Little Rock Railroad Company	1,567 45	
	Southern Express Company	675 68	
	Coupon ticket account	6,017 94	
	United States (mail pay)	4,008 55	
	Reclamations	333 27	
	Sundry roads and persons	2,122 19	
	Mileage	181 65	
	Land department	28 55	
	Land notes	160 03	
	Interest on land notes	26 05	
			86,286 68
			$134,664 26

CREDIT.

April 30.	By disbursements in April, as per Exhibit No. 11		61,459 24
April 30.	By Balance to May, 1883, account		$73,205 02

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

118 EXHIBIT B 12.

Statement of Receipts for Month of May, 1883.

1883.			
May 1.	To balance from April 30, 1883		$73,205 02
May 31.	To receipts from—		
	Agents and conductors	$58,640 53	
	Express department Memphis and Little Rock Railroad Company	1,331 65	
	Southern Express Company	1,011 21	
	Coupon ticket account	5,276 41	
	Conducting transportation	41 25	
	Material and supplies	4 70	
	Memphis and Little Rock Railroad Company, as reorganized	70 00	

Reclamations	51 42	
Sundry roads and persons	2,783 15	
Mileage	89	
Land notes (int. included)	157 50	
		69,368 71
		$142,573 73

CREDIT.

May 31. By disbursements in May, as per Exhibit No. 12		73,853 09
May 31. By balance to June, 1883, account		$68,720 64

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

EXHIBIT B 13.

Statement of Receipts for Month of June, 1883.

1883.			
June 1.	To balance from May 31, 1883		$68,720 64
June 30.	To receipts from—		
	Agents and conductors	$72,590 12	
	Express department Memphis and Little Rock Railroad Company	1,541 43	
	Southern Express Company	928 01	
	Coupon ticket account	4,838 32	
	Reclamations	632 56	
	Sundry roads and persons	3,884 23	
	Accounts audited	152 85	
			84,577 52
			$153,298 16

CREDIT.

June 30. By disbursements in June, as per Exhibit No. 13		66,108 65
By balance to July, 1883, account		$87,189 51

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

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EXHIBIT B 14.

Statement of Receipts for Month of July, 1883.

1883.			
July 31.	To balance from June 31, 1883		$87,189 51
	To receipts from—		
	Agents and conductors	$66,270 86	
	Express department	1,717 37	
	Southern Express Company	757 82	
	Coupon ticket account	5,096 29	
	United States (mail pay)	4,060 75	
	Reclamations	382 70	
	Sundry roads and persons	991 45	
	Steamer Ida Darragh	5 25	
	Mileage	31 55	
	Land department	5 60	
	Land notes	26 50	
	Interest and exchange	30	
			79,346 44
			$166,535 95

CREDIT.

July 31.	By disbursements in July, as per Exhibit No. 14		50,211 67
	By balance to August, 1883, account		$116,324 28

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

EXHIBIT B 15.

Statement of Receipts for Month of August, 1883.

1883.			
Aug. 31.	To balance from July 31		116,324 28
	To receipts from—		
	Agents and conductors	$72,695 91	
	Express department	1,371 63	
	Southern Express Company	800 87	
	Material and supplies	643 40	
	Coupon ticket account	4,831 35	
	Reclamations	179 41	
	Sundry roads and persons	1,938 44	
			82,461 01
			$198,785 29

CREDIT.

Aug. 31.	By disbursements in August, as per Exhibit No. 15		56,374 90
	By balance to September, 1883, account		$142,410 39

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

120 EXHIBIT B 16.

Statement of Receipts for Month of September, 1883.

1883.			
Sept. 30.	To balance from August 31, 1883		$142,410 39
	To receipts from—		
	Agents and conductors	$76,618 79	
	Express department	1,638 79	
	Southern Express Company	833 70	
	Land notes (int. included)	37 29	
	Coupon ticket account	6,229 21	
	Reclamations	264 68	
	Sundry roads and persons	56,621 71	
			142,244 17
			$284,654 56

CREDIT.

Sept. 30.	By disbursements in September, as per Exhibit No. 16		72,114 33
	By balance to October, 1883, account		$212,540 23

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

EXHIBIT B 17.

Statement of Receipts for Month of October, 1883.

1883.			
Oct. 31.	To balance from September 30, 1883		$212,540 23
	To receipts from—		
	Agents and conductors	$87,328 23	
	Express department	2,464 62	
	Southern Express Company	936 27	
	United States (mail pay)	3,810 75	
	Suspense account	31 45	
	Land notes	437 15	

Interest and exchange	97 80	
Land department	5 60	
Coupon ticket account	7,277 57	
Reclamations	387 20	
Sundry roads and persons	675 49	
		103,452 13
		$315,992 36

CREDIT.

Oct. 31. By disbursements in October, as per Exhibit No. 17		75,782 59
By balance to November, 1883, account		$240,209 77

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

121 EXHIBIT B 18.

Statement of Receipts for Month of November, 1883.

1883. Nov. 1. To balance from October 31, 1883		$240,209 77
To receipts from—		
Land notes	$742 68	
Interest on land notes	105 53	
Agents and conductors	94,556 97	
Express department	2,370 11	
Southern Express Company	2,508 26	
Coupon ticket account	33,673 11	
United States mail pay	2,957 16	
Reclamations	1,535 47	
Sundry roads and persons	2,887 95	
Mileage	72 45	
		141,409 69
		$381,619 46

CREDIT.

Nov. 30. By disbursements in November, as per Exhibit No. 6		162,620 48
By balance on hand		$218,998 98

E. K. SIBLEY, *Receiver.*
JOHN W. GOODWIN,
Treasurer for Receiver.

EXHIBIT C.

Circuit Court of the United States, Eastern District of Arkansas.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized, Defendant. } No. 512.

MASTER'S OFFICE.

By virtue of an order of reference made in the above-entitled cause on the 14th day of February, A. D. 1884, I do hereby appoint the third day of March, A. D. 1884, at 10 o'clock in the forenoon of that day, as the time and my office, in the city of Little Rock, Arkansas, as the place to hear and consider of the matters in said order referred upon the passing of receiver's accounts; at which time and place all parties concerned are notified to attend and take such part in the proceedings as by law and the orders of said court they are entitled. Upon failure of appearance of either party said matter will be proceeded with *ex parte*.

Dated the 26th day of February, A. D. 1884.

CHAS. P. REDMOND, *Master.*

I acknowledge service of a copy of above notice this March 1, 1884.

E. K. SIBLEY.

I acknowledge service of a copy of above notice this 26th day of February, 1884.

S. R. COCKRILL,
Solicitor for Complainant.

We acknowledge service of a copy of above notice this 26th day of February, A. D. 1884.

B. C. BROWN,
Solicitor for Defendant.
J. M. ROSE,
Solicitor for Eq. Ass. Co.

We acknowledge service of a copy of above notice this 26th day of February, A. D. 1884.

U. M. & G. B. ROSE,
Solicitors for Interveners.

122 EXHIBIT D.

Circuit Court of the United States, Eastern District of Arkansas, in Chancery Sitting.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant. } No. 512.

MASTER'S OFFICE.

Received of Charles P. Redmond, master in the above-entitled cause, packages said to contain 4,548 vouchers for disbursements of receiver in said cause; also 19 pay-rolls, said to be vouchers for said receiver's disbursements, both of which are received by me as a part of said master's report.

RALPH L. GOODRICH, *Clerk*.

EXHIBIT E 1.

Circuit Court of the United States, Eastern District of Arkansas, in Chancery Sitting.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant. } No. 512.

MASTER'S OFFICE, *March* 20, 1884.

John W. Goodwin, being first duly sworn, deposes and says: My name is John W. Goodwin. I am secretary and cashier of the Memphis and Little Rock Railroad Company, as reorganized, and have been since June 24th, 1882. I have been secretary of the road since April 30th, 1877; have been connected with the road as secretary or treasurer or cashier since 1869. I keep the cash account of the railroad; am familiar with the general accounts of — railroad. I have kept the accounts of the receipts and disbursements of the railroad since June 24, 1882. The schedules marked A 1 to A 19, both inclusive, contain a correct statement of all the disbursements and payments made from the funds of said railroad from June 25th, 1882, to December 1st, 1883, for obligations and debts incurred between those dates, though some of the payments were actually made subsequent to December 1, 1883.

The statements marked B 1 to B 18, both inclusive, contain a correct statement of all the receipts of said road during the receivership of E. K. Sibley; period from June 25, 1882, to December 1, 1883.

In the schedules of disbursements filed by the master the several items, one in the schedule for each month, marked John W. Goodwin drafts, and put in as vouchers for money paid, *is* made up of drafts drawn upon the company for freight charges collected by our road and due to other roads and steamboats, and for ticket balances due other roads, and for mileage balances, and of drafts drawn by

our agents in favor of the agents of other railroads for freight charges due to other roads, and are therefore properly when indorsed receipts for money paid. The drafts drawn by our agents are charged to them in the auditor's office.

The several items in the schedules of disbursements marked "agents' pay-rolls" and signed by the station agents include the salaries of the agents and their commissions and the expenses of the stations not included in the general pay-roll and freight on the company's supplies which is charged to them, and the vouchers for these items of expense are filed in the auditor's office.

JOHN W. GOODWIN.

Subscribed and sworn to before me this 20th day of March, 1884.
CHAS. P. REDMOND, *Master*.

123 EXHIBIT E 2.

Circuit Court of the United States, Eastern District of Arkansas, in Chancery Sitting.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant. } No. 512.

MASTER'S OFFICE, *April* 5, 1884.

JOHN W. GOODWIN, being duly sworn, deposes and says in answer to interrogatories:

First Interrogatory. How many shares of stock are there in the Memphis and Little Rock Railroad Company, as reorganized?

Answer. Fifteen thousand shares of $100 each, capital stock.

Second Interrogatory. How long have you been secretary of present company?

Answer. Since its organization.

Third Interrogatory. How many shares of stock are held by Jay Gould, Russell Sage, and Henry G. Marquand?

Answer. They hold as trustees 13,582½ shares.

Fourth Interrogatory. What are they trustees for?

Answer. I don't know.

Fifth Interrogatory. At what time did Mr. Sibley resign his position as general manager in 1882?

Answer. He resigned as director June 27, 1882; don't remember whether that included his position as general manager or not.

Sixth Interrogatory. Who was president of the company in June, 1882?

Answer. F. A. Marquand; he lives in New York.

Seventh Interrogatory. Who was attorney of the company at — time the receiver was appointed?

Answer. Judge B. C. Brown, elected February 15, 1882.

Eighth Interrogatory. What time did he resign as attorney?

Answer. I don't know that he resigned at all.

Ninth Interrogatory. Did he resign as director about that time?

Answer. I understood he sent his resignation to the president about that time; don't know, of my own knowledge, anything about it.

Tenth Interrogatory. Do the records of the company show a resolution of the stockholders authorizing B. C. Brown to enter the appearance of the company to all suits that might be brought against it?

Answer. I think there was such a resolution passed February 15th, 1883, authorizing the general counsel of the company to make answer for the company. A copy of said resolution is attached hereto, marked "Exhibit 6."

Eleventh Interrogatory. Did you tender your resignation about October, 1882?

Answer. Yes, sir; October 2; I think addressed to the president, at New York.

Twelfth Interrogatory. What induced you to do that?

Answer. I think Mr. Sibley said it was desired.

Thirteenth Interrogatory. On what ground did he say it was desired?

Answer. I think it was that they did not wish any representative of the company here.

Fourteenth Interrogatory. What reason did he give for not wishing any representative of the company here?

Answer. As well as I remember, it was to keep from having some papers served on the company. I don't remember what suit it was.

Fifteenth Interrogatory. Who were the members of the board of directors at that time, June 1st, 1882?

Answer. F. A. Marquand, E. K. Sibley, Thos. Essex, R. S. Hays, and B. C. Brown. I don't know when Brown resigned. He was elected February, 1882.

124 Cross-examined by B. C. BROWN, for defendant:

First Interrogatory. Was your resignation as secretary accepted by the president of the company?

Answer. My resignation was returned to me under date of October 18, 1882, not accepted, and a request to continue in the position.

JOHN W. GOODWIN.

Subscribed and sworn to before me this 5th day of April, 1884.

CHAS. P. REDMOND, *Master.*

At this point B. C. Brown, counsel for said railroad company, offers to furnish, if desired by the counsel for supposed interveners or by the master, the information and give the name of the party for whom J. Gould, Russell Sage, and Henry G. Marquand hold the 13,582½ shares of the defendant; whereupon he is requested by the master to state said fact, and counsel says:

Those 13,582½ shares are owned by the St. Louis, Iron Mountain and Southern Railroad Company, and that Gould, Sage, and Marquand hold the legal title to said shares as trustees of said company.

Gould, Sage, and Marquand do not own largely of the stock of the Iron Mountain road, but, as I am informed by the officers and believe, almost the entire stock of that company is owned by the Missouri Pacific Railroad Company, and I understand those three gentlemen are very large holders of the stock of the Missouri Pacific Railroad Company.

CHAS. P. REDMOND, *Master.*

"EXHIBIT 6."

Memphis and Little Rock Railroad Company (as Reorganized.)

Stockholders' Meeting.

LITTLE ROCK, ARKANSAS, *May* 15, 1883.

* * * * * * *

K. K. Sibley offered the following resolution:

Whereas a number of actions at law have been brought against this company in which no service of process has been had; and whereas other actions will be brought, all of which must be met and defended; and whereas costs will be saved by waiving process and by entering the appearance of the company to such actions: Therefore

Resolved, That B. C. Brown, the general counsel, be, and he is hereby, authorized and empowered to waive service of process and to enter the appearance of this company to all actions pending or hereafter brought against this company.

On motion of E. K. Sibley the resolution was unanimously adopted.

A true copy from the minutes.

JOHN W. GOODWIN, *Secretary.*

EXHIBIT F.

STATE OF ARKANSAS, *County of Pulaski:*

I, J. L. Bay, clerk of the circuit court of and *ex officio* recorder of Pulaski county, Arkansas, hereby certify that I have examined the records of Pulaski county, Arkansas, for mortgages made by the Memphis and Little Rock Railroad Company (as reorganized), and find the only mortgages made by said company of record in my office are the following:

Mortgage dated May 1st, 1877, to secure bonds amounting to 250,000 dollars, maturing in installments of 50,000 dollars each, due May 1st, in the years 1879 to 1883, inclusive.

Mortgage dated May 2d, 1877, to secure bonds to amount of 2,600,000 dollars, bearing interest after July 1, 1882, at eight per cent., payable July 1, 1907.

125 And supplemental mortgage dated the 26th day of September, 1877, supplying omission in one clause of the mortgage of May 2, 1877.

In witness whereof I, said J. L. Bay, clerk and *ex officio* recorder of Pulaski county as aforesaid, have hereunto set my hand and affixed the seal of said circuit court hereto this 1st day of April, 1884.

J. L. BAY, *Clerk*,
By W. B. HUGHES, *D. C.*

EXHIBIT G.

Monthly Cash Balances.

June 25,	1882, as per Exhibit		B1	$31,957 56
June 30,	"	"	B1	49,642 69
July 31,	"	"	B2	65,265 35
August 31,	"	"	B3	67,359 60
September 30,	"	"	B4	71,438 85
October 31,	"	"	B5	55,695 02
November 30,	"	"	B6	86,424 78
December 31,	"	"	B7	92,832 61
January 31,	1883,	"	B8	105,495 61
February 28;	"	"	B9	61,718 00
March 31,	"	"	B10	48,377 58
April 30,	"	"	B11	73,205 02
May 31,	"	"	B12	68,720 64
June 30,	"	"	B13	87,189 51
July 31,	"	"	B14	116,324 28
August 31,	"	"	B15	142,410 39
September 30,	"	"	B16	212,540 23
October 31,	"	"	B17	240,209 77
November 30,	"	"	B18	218,998 98

EXHIBIT H.

Total Monthly Disbursements.

June and July,	1882, as per Exhibit		A1	$36,743 61
August,	"	"	A2	63,248 68
September,	"	"	A3	72,966 42
October,	"	"	A4	115,296 90
November,	"	"	A5	100,830 19
December,	"	"	A6	119,475 90
January,	1883,	"	A7	105,601 48
February,	"	"	A8	124,191 66
March,	"	"	A9	100,040 96
April,	"	"	A10	61,459 24
May,	"	"	A11	72,853 09
June,	"	"	A12	66,108 65
July,	"	"	A13	50,211 67
August,	"	"	A14	56,374 90
September,	"	"	A15	72,114 33
October,	"	"	A16	75,782 59
November,	"	"	A17	62,595 51
December,	"	"	A18, 19	100,024 97
				$1,456,920 75

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EXHIBIT J.

Total Monthly Receipts.

June 25,	1882, as per	Exhibit	B1	$31,957 76
June 30,	"	"	B1	17,684 93
July,	"	"	B2	52,366 27
August,	"	"	B3	65,342 93
September,	"	"	B4	77,045 67
October,	"	"	B5	99,553 07
November,	"	"	B6	131,559 95
December,	"	"	B7	125,883 73
January,	1883,	"	B8	118,264 48
February,	"	"	B9	80,414 05
March,	"	"	B10	86,700 54
April,	"	"	B11	86,286 68
May,	"	"	B12	69,368 71
June,	"	"	B13	84,577 52
July,	"	"	B14	79,346 44
August,	"	"	B15	82,461 01
September,	"	"	B16	142,244 17
October,	"	"	B17	103,452 13
November,	"	"	B18	141,409 69
				$1,675,919 73

EXHIBIT K.

Pay-Rolls.

June and July,	1882, as per	Exhibit	A1	$19,869 05
August,	"	"	A2	20,111 62
September,	"	"	A3	22,005 58
October,	"	"	A4	22,101 28
November,	"	"	A5	24,032 31
December,	"	"	A6	26,480 69
January,	1883,	"	A7	28,812 39
February,	"	"	A8	29,250 92
March,	"	"	A9	26,507 79
April,	"	"	A10	23,771 22
May,	"	"	A11	29,599 54
June,	"	"	A12	29,510 99
July,	"	"	A13	22,950 26
August,	"	"	A14	22,860 69
September,	"	"	A15	25,746 47
October,	"	"	A16	26,756 86
November,	"	"	A17, 18, 19	58,743 45
				$459,111 11

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EXHIBIT L.

Cash Vouchers.

Per Exhibit A1,	June and July,	1882,	244	vouchers	$16,874 56
" A2,	August,	"	206	"	43,137 06
" A3,	September,	"	208	"	50,960 84
" A4,	October,	"	167	"	93,195 62
" A5,	November,	"	286	"	76,797 88
" A6,	December,	"	175	"	92,995 21
" A7,	January,	1883,	241	"	76,789 09
" A8,	February,	"	329	"	94,940 74
" A9,	March,	"	231	"	73,533 17
" A10,	April,	"	244	"	37,688 02
" A11,	May,	"	355	"	44,253 55
" A12,	June,	"	208	"	36,597 66
" A13,	July,	"	311	"	27,261 41
" A14,	August,	"	203	"	33,514 21
" A15,	September,	"	251	"	46,367 86
" A16,	October,	"	278	"	49,025 73
" A17,	November,	"	220	"	103,877 03
" A18, 19,	December,	"	391	"	
			4,548		$997,809 64

EXHIBIT M 1.

Circuit Court of the United States, Eastern District of Arkansas, in Chancery Sitting.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant. } No. 512.

MASTER'S OFFICE.

E. K. SIBLEY, being first duly sworn, deposes and says: I am general manager of the Memphis & Little Rock Railroad Company (as reorganized), and was receiver of said road from June 24, 1882, to December first, 1883.

The papers filed with the master and by him marked Exhibits A 1 to A 19, both inclusive, are correct schedules of all disbursements made by me upon vouchers during my receivership, and the Exhibits B 1 to B 18, both inclusive, are correct statements of all the receipts of said road during my receivership.

Compensation.

The claim made by me for services of $7,500 per annum is in addition to the salary I have received as general manager; this would make my total compensation as both receiver and general manager $13,500 per annum.

I was general manager of the road previous to the receivership.

The company first made default on the interest on its bonds January 1st, 1882, but between that time and June 24, 1882, as I am informed, the money was borrowed and the January interest paid.

First Question. Have the coupons for the January interest, 1882, been filed in the office of the company at Little Rock up to the present time?

Answer. Not to my knowledge.

Second Question. Is it and has it been heretofore the customary and usual course of business for coupons when paid to be filed in the office at Little Rock?

Answer. I understand it has, whenever the money was paid out of the treasury of the company; in this case I understand it was not.

Third Question. When did you first receive notice, and by what means, and from whom, of the directors' meeting of the company in St. Louis, June 22d, 1882?

Answer. I received notice by telegram from R. S. Hays,
128 dated June 20th, 1882, that President Marquand would call a meeting, and received further notice, by telegram from President F. A. Marquand, dated June 21st, 1882, addressed to John W. Goodwin, secretary, instructing him to call a meeting of directors.

Fourth Question. When were you first consulted about or apprised of the fact that you were to be appointed receiver of said railroad?

Answer. About the twenty-fourth day of June, 1882.

Fifth Question. Can you not state the time more accurately, whether or not it was not some day previous to June 24th?

Answer. It may have been two or three days previous.

The actual amount drawn by me as general manager for the seventeen months and six days of the receivership is $9,233.31, and the amount drawn by me for salary and expenses as receiver during the receivership is $4,500.00, as stated by me in my report, being in all, for my services in both capacities, $13.733.31.

As to the salary of $6,000 per year as general manager, I was offered, in March, 1883, a salary of $8,000 per annum, and all expenses when away from home, as general manager of the Toledo, Cincinnati & St. Louis Railroad Company, and therefore deem it proper to increase my salary accordingly.

Legal Expenses.

I have paid out no money as receiver, either for counsel fees or costs in this case, except some trifling costs in the Pulaski chancery court and United States court.

Have paid B. C. Brown his regular salary of $300 per month, as previous to receivership, and some small items of legal expenses incurred by him, and also $1,000 for services to receiver.

Have also paid, for legal services, W. G. Weatherford, $62.50; George Sibley, $20; John W. Cameron, $20.83, per month each, their regular salaries as attorneys for the road, as before receiver-

ship, at Memphis, Washington, D. C., and Lonoke, Arkansas. To J. W. Cameron I have paid amount due him on contract for services at Washington before receivership.

Betterments and Operating Expenses.

The approximate monthly gross earnings of the road during my receivership was $75,000.

The approximate monthly disbursements during my receivership were about $85,700 per month; of this the approximate average monthly payments on vouchers were $58,600 and the approximate average monthly payments on pay-rolls were $27,000.

The above average monthly disbursements on vouchers and pay-rolls include amounts paid for balances due by the company prior to the date of the receiverships, and are the actual expenses of the road during the receivership.

The gross average approximate monthly expenditures for operation, maintenance, and repair of road, motive power, &c., during the receivership were, after deducting the $60,704.57 received for old material, $61,000 per month.

The gross average approximate monthly expenditures for operation, maintenance, and repairs of road, motive power, &c., for the period from January 1 to June 30, 1882, were $34,816.93.

The amount expended during this period was limited to the amount of earnings, the total earnings being for that period only $24,669.28 more than the amount expended. The track was overflowed during the winter and spring months, which made it impossible to make repairs.

In explanation of my answers to questions Nos. one and two I desire to state that the office of the treasurer of the company was heretofore in Little Rock; that at the time these coupons were
129 paid the treasurer's office was in New York and the assistant treasurer's office was in St. Louis, and, I am informed, the coupons are in the office of the assistant treasurer at St. Louis.

E. K. SIBLEY.

Subscribed and sworn to before me the 25th day of March, 1884.

CHARLES. P. REDMOND, *Master.*

EXHIBIT M 2.

Notice to Take Depositions.

To Russell Sage and the Memphis & Little Rock railroad (as reorganized):

Take notice that in a case pending in the circuit court of the United States for the eastern district of Arkansas, in a certain case there pending, wherein you are plaintiff and the Memphis & Little Rock Railroad Company is defendant, I shall proceed, on the fourth day of April, 1884, between the hours of nine a. m. and five p. m. of said day, at the office of Charles P. Redmond, master, in the city of Little Rock, in the county of Pulaski, in the State of Arkansas, to

take the depositions of witnesses to be read as evidence on the trial of said case, when and where you may attend if you think proper; and the taking of depositions under this notice, if not completed on said day, will be continued over from day to day therafter, at the same place and between the same hours, until concluded.

Given this fifteenth day of April, 1884.

IRA COLBY,
By U. M. & G. B. ROSE.

We acknowledge service of the within April 1, 1884.

B. C. BROWN,
For Memphis & Little Rock Railroad Company.
S. R. COCKRILL, *for Sage.*

Circuit Court of the United States, Eastern District of Arkansas, in Chancery Sitting.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant. } No. 512.

MASTER'S OFFICE.

E. K. SIBLEY, being first duly sworn, deposes and says in answer to interrogatories:

First Interrogatory. In what way are you connected with the defendant company?

Answer. At present I am general manager of the road.

Second Interrogatory. How long have you occupied that position?

Answer. The last time since the receivership. I was general manager at the time I was appointed receiver; was appointed manager February 15th, 1881.

Third Interrogatory. At what time was it first mentioned to you that a receiver would probably be appointed on the road?

Answer. I can't give the exact date; it was a few days prior to June 24th, 1882; probably not more than three or four days.

Fourth Interrogatory. Who mentioned it to you?

Answer. My impression is B. C. Brown first mentioned it to me.

Fifth Interrogatory. What did he say about it?

Answer. My recollection is that he informed me a bill would be filed for a receiver and, if successful, my name would be suggested as the receiver, and he asked me if I could file a satisfactory bond.

Sixth Interrogatory. Who prepared your bond?

Answer. I can't state who prepared it. I was notified of my appointment by B. C. Brown, who brought me the bond with request that I have it properly executed and filed. B. C. Brown, being present, tells me here and now that he prepared the bond.

130 Seventh Interrogatory. Who was your attorney as receiver?

Answer. B. C. Brown.

Eighth Interrogatory. What step did you take with the agent and employés of the road after you became receiver; did you require them to hold under you as receiver?

Answer. I issued notice to all agents, employés, and heads of the different departments informing them of my appointment and giving notice to them that they would be retained at the same compensation previously paid them by the company. I attach a copy of said notice, marked Exhibit 2, as a part of my deposition.

Ninth Interrogatory. Did you issue any other notice or circular letter of a similar kind?

Answer. Yes, sir; I think there were two other circular letters or notices issued. I attach copies of them, marked Exhibits 3 and 4, as part of my deposition.

Tenth Interrogatory. Did these agents and employés resign their positions under the company?

Answer. They did not. The circular which I sent out required them to acknowledge receipt of the notice and to sign and return to me a blank which accompanied the circular, which blank was an agreement to accept service under me as receiver.

Eleventh Interrogatory. Were these blanks generally signed and returned?

Answer. Yes, sir; I attach a copy of one of the blanks, marked Exhibit 5, as part of my deposition.

E. K. SIBLEY.

Subscribed and sworn to before me this fourth day of April, 1884.
CHARLES P. REDMOND, *Master.*

EXHIBIT 2.

Memphis & Little Rock Railroad Company (as reorganized).

OFFICE RECEIVER, LITTLE ROCK,
ARKANSAS, *June* 24, 1882.

To officers and employés M. & L. Railroad Company:

Having been appointed receiver of the chancery court of Pulaski county in the cause of Russell Sage *v.* The Memphis & Little Rock Railroad Company (as reorganized), and as such receiver having been placed by said court in possession of the Memphis & Little Rock railroad, its tracks, depots, inclines, boat, rolling stock, and all other property of every character, it is ordered—

First. That until further orders all officers and employés formerly employed by said railroad company will be continued in office and place at the same compensation formerly paid them by said railroad company. Each such officer and employé will, within five days, sign and return to me at my office in Little Rock the inclosed acknowledgment of the reception of this order.

Second. Station agents and all other accounting officers will render stated accounts at the times and in the form heretofore used, such accounts to be addressed to C. H. Dolbeer, auditor for E. K. Sibley, receiver, and will remit or pay all moneys to John W. Goodwin, treasurer for the receiver.

Third. Station agents will post up at their depots and at other public places adjacent copies of the notices herewith handed them,

and will use every effort to inform the public that the railroad, rolling stock, and all other property of the Memphis & Little Rock Railroad Company is in my hands as receiver, and that any one interfering with or in any manner interrupting my possession of any part of such property will be in contempt of said court and liable to be punished by fine or imprisonment or both.

Respectfully, E. K. SIBLEY, *Receiver.*

131 EXHIBIT 3.

Memphis & Little Rock Railroad Company (as reorganized). E. K. Sibley, receiver.

OFFICE OF AUDITOR FOR THE RECEIVER,
LITTLE ROCK, *June* 24, 1882.

DEAR SIR: I inclose circular announcing the appointment of E. K. Sibley, receiver for this road. In making out your reports of coupon ticket sales on account of this company for the month of June it will be necessary to make two separate reports, one to the Memphis & Little Rock Railroad Company (as reorganized) for all sales from June 1st to 24th, inclusive, and one to E. K. Sibley, receiver, for all sales from June 25th to 30th, inclusive; both of which should be sent to me as auditor for the receiver. Please note and comply with this request and oblige,

Yours truly, C. H. DOLBEER,
Auditor for the Receiver.

EXHIBIT 4.

Notice.

Memphis & Little Rock Railroad Company (as Reorganized).

OFFICE RECEIVER, LITTLE ROCK,
ARKANSAS, *June* 24, 1882.

Notice is hereby given that the Memphis & Little — railroad (as reorganized), with all its tracks, inclines, boat, locomotives, passenger cars, freight cars, hand cars, materials, tools, lands, books, papers, and all its other property have been placed in my hands as receiver of the chancery court of Pulaski county in the cause of Russell Sage *v.* The Memphis & Little Rock Railroad Company (as reorganized), and that any one interfering with my possession or levying upon or seizing any of said property, whether by virtue of a writ from any court of justice or otherwise, will be in contempt of said chancery court and will be prosecuted and punished.

Respectfully, E. K. SIBLEY, *Receiver.*

Post this notice.

EXHIBIT 5.

E. K. Sibley, Esq., receiver Pulaski chancery court, Little Rock, Ark.

SIR: I have received your general order No. 1, issued as receiver, and understand the same, and will act under you and obey your orders and those of said court.

——.

EXHIBIT N.

Circuit Court of the United States, Eastern District of Arkansas, in Chancery Sitting.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant. } No. 512.

MASTER'S OFFICE, *April* 2, 1884.

HENRY G. FLEMING, being first duly sworn, deposes and says:

My business is that of a civil engineer. I have been chief engineer for the Memphis and Little Rock railroad and the receiver from March, 1881, to the present time. The improvements, betterments, and constructions on said road during that time have been made under my directions and instructions.

Question. Can you tell what part of the expenditures named under the head "Maintenance of way" in "Exhibit D" to receiver's report, filed February 12, 1884, were necessary to keep the railroad in a fairly safe condition for the running of trains, and how much might be termed betterments or improvements?

Answer. I can tell. Under former management of the road a construction account was kept and all matters regarded as betterments were charged to that account. I attach hereto as a
132 part of my deposition a statement showing what part of the items "Maintenance of way" would under the previous system have been charged to construction; it shows $59,412.13 in the aggregate, and is marked { X } and signed by me.

Question. In the paper { X } you have charged only $2,111 as new construction of bridges. Do you mean that $47,000 was necessarily expended in repairs of bridges during the receivership?

Answer. I consider $47,000 necessary for bridge repairs during that time. I have spent on St. Francis bridge, including new pier, about $8,000, including the $2,000 in the construction account; new trestle at Burnt Cane, $6,000. It was absolutely necessary to have a new trestle here; it was rotten and unsafe throughout.

Question. Do you consider $226,000 for rails, or fifty-two miles of new rails as stated by the receiver in his report, as necessary to the safe running of trains on said road?

Answer. I considered that the fifty-two miles of old iron which this replaced was necessary to be taken up and unfit for safe running of trains.

Question. When were these new rails laid?

Answer. I think we commenced laying these new rails in August or September, 1882.

Question. Had you not run your trains safely, by aid of repairs, previous to purchase of these rails?

Answer. Reasonably so.

Question. Could you not by expenditure of a moderate amount for repairs and careful management have continued to runs trains reasonably safely without the purchase of these new rails?

Answer. Not safely with the traffic we were handling and the time we were forced to make, in my opinion.

Question. Could you not have done so by reducing the speed of your trains?

Answer. We could with a great degree of safety, but not entirely so.

Question. What proportion, approximately, of the $20,000 expended for spikes, splices, and bolts was for laying these new rails, as you now estimate?

Answer. I should say about eighty per cent.

Question. What proportion, approximately, of the item of $90,477.96 for track, labor, and repairs was due to laying of new rails and new embankment or grading, filling trestles, and such improvements as would under your old system have been charged to construction?

Answer. I have given the construction item in my statement { X }, and in addition to that the labor on laying the new rails would have been between $8,000 and $10,000 *dollars.*

The item extraordinary expenses is on account of the overflows of 1882 and 1883.

Question. In your opinion, how much more, approximately, was the said railroad worth, if anything, by reason of improvements made on it, at the end of the receivership than at the beginning—that is, the value of the corporeal property, without regard to its increased capacity for business?

Answer. I think I know the difference, approximately; I roughly estimate the difference in value at $225,000.

Explanation.

I desire to say that in order to make connection for passenger business at Memphis and Little Rock the speed of our trains is regulated by the time of the connecting roads, and that the speed of the trains in the last two years has been increased on this account.

H. G. FLEMING.

Subscribed and sworn to before me this second day of April, 1884.

CHARLES P. REDMOND, *Master.*

133 EXHIBIT { X. }

Memphis and Little Rock Railroad Company (as reorganized).

OFFICE SUPERINTENDENT AND CHIEF ENGINEER.

89	Ballast	$1,827 25
90	Bridge masonry	2,111 00
91	Bridge superstructure	601 99
96	Cattle guards and road crossings	371 64
98	Engine-houses and turn-tables	33 75
99	Engineers, salary, expense of	3,100 20
100	Fences and gates	40 00
101	Foremen and watch-houses	4,377 30
103	Grading	19,265 73

106	Incline planes	4,382 70
119	Stations, passenger and freight	14,559 19
120	Stations, fuel and water	702 37
122	Switches and fixtures	3,684 80
124	Track, labor laying	1,577 26
115	Real estate	2,776 95
		$59,412 13

{ X } H. G. FLEMING.

C. P. REDMOND, *Master.*

EXHIBIT O.

Circuit Court of the United States, Eastern District of Arkansas.
In Chancery Sitting.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant. } No. 512.

MASTER'S OFFICE, *April* 4, 1884.

S. R. COCKRILL being examined by U. M. ROSE, Esq., for intervenors:

Present: B. C. Brown, Esq., counsel for the company.

First Interrogatory. Are you the attorney for the plaintiff in this suit?

Answer. I am.

Second Interrogatory. Did you prepare the bill in this case?

Answer. I prepared the bill from a memorandum that was furnished me, and filed it.

Third Interrogatory. Who furnished you the memorandum?

Witness objects to answering this question, because, as counsel for plaintiff, it is privileged.

Fourth Interrogatory. By whom were you retained?

Answer. By Russell Sage.

Fifth Interrogatory. Were you retained by him directly or through the agency of another person?

Answer. In June, 1882, Governor John C. Brown, of St. Louis, delivered to me a letter signed by Russell Sage, requesting him, Governor Brown, to employ an attorney at Little Rock to enforce a claim for him, Sage, against the Memphis and Little Rock railroad. After some conference about the terms of compensation Sage's letter and the claim were turned over to me; and Mr. Sage shortly thereafter sent me his draft on New York in payment of retainer. Sage's letter to Governor Brown, letter marked Exhibit I, is hereto attached as a part of my deposition.

Sixth Interrogatory. At what place did you have your interview with Governor Brown?

Answer. At the city of St. Louis.

134 Seventh Interrogatory. Did you go there to meet him on that business specially?

Answer. I went to St. Louis on Governor Brown's request, and ascertained from him that that was the business he desired to see me about.

Eighth Interrogatory. How was that request communicated to you?

Answer. Through B. C. Brown, of this city. I am assured, however, that it was not through B. C. Brown's influence or at his suggestion that Governor Brown desired to communicate with me.

Ninth Interrogatory. From whom did you receive that assurance?

Answer. Governor Brown spoke of it himself, he being an old family friend.

Tenth Interrogatory. How long was the bill prepared before it was filed?

Answer. The bill was prepared the evening before the judgment was rendered upon which the bill is based?

Eleventh Interrogatory. Was B. C. Brown, the attorney of the railroad company, present when the judgment in the United States court upon which the bill is based was rendered?

Answer. He was.

Twelfth Interrogatory. Did he see the bill in this case before it was filed?

Answer. He did.

Thirteenth Interrogatory. At the time the judgment was rendered in the United States court had he informed you that no objection would be made to the appointment of a receiver?

Answer. He stated that no objection would be made to the appointment of a receiver.

Fourteenth Interrogatory. Did he suggest a suitable person to act as receiver?

Answer. Yes; I think he made the suggestion of Mr. Sibley, and he was appointed by consent.

Fifteenth Interrogatory. Do you remember who drew the draft of the order for the appointment of the receiver and defining his powers?

Answer. The draft furnished the clerk was drawn by B. C. Brown. We had conferred about the order, and I left it to him after that to prepare the order for the clerk.

Cross-examined by B. C. BROWN, for defendant:

First Interrogatory. Did you, during the progress of this suit, at any time, as counsel for plaintiff, do or say anything to hinder or delay the bringing of any suit against defendant or to delay or hinder the collection of any debt due from or by the defendant?

Answer. Nothing further than to undertake to hold the receiver in office, but that was not for the purpose of hindering or delaying the creditors.

Second Interrogatory. Had you ever any instructions or any request from Russell Sage to do or say anything to hinder or delay the collection of debts due by said defendant?

Answer. I had not.

Third Interrogatory. Was it or was it not your opinion as counsel that the bill prepared by you on behalf of plaintiff presented a good and sufficient case for the appointment of a receiver?

Answer. I thought it presented a sufficient case and think so still.

Re-examined for interveners:

First Interrogatory. From whom did you receive instructions to continue the receiver in possession?

Answer. Can't say I had any positive instructions to either continue or discontinue the receiver. He was continued for awhile by consent of all parties concerned.

Second Interrogatory. With whom did you correspond about the suit?

Answer. In part with plaintiff. My main correspondence
135 has been with John C. Brown about the settlement of my fee, inasmuch as the agreement for compensation was made with him.

Third Interrogatory. How many letters did you receive from Sage?

Answer. There were not many I wrote him oftener than I received replies.

S. R. COCKRILL, JR.

CHARLES P. REDMOND, *Master.*

EXHIBIT 1 TO COCKRILL'S DEPOSITION.

OFFICE OF RUSSELL SAGE,
80 BROADWAY, ROOMS 27, 28, AND 29,
NEW YORK, *June* 20, 1882.

Honorable J. C. Brown, St. Louis, Mo.

DEAR SIR: Will you do me the favor to select some good, reliable attorney in Little Rock to enforce my claim against the Memphis and Little Rock R. R. Co., making with him for me a definite contract as to his compensation?

Very truly yours, RUSSELL SAGE.

C. P. R.
S. R. COCKRILL.

Sterling R. Cockrill, Esq., Little Rock, Arkansas.

DEAR SIR: Pursuant to this, the inclosed authority from Russell Sage, of New York, I confide the business mentioned in this letter to you on the terms agreed upon between us.

Yours, JOHN C. BROWN.

St. Louis, Mo., June 22, 1882.

EXHIBIT P.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant.

To the Hon. Chas. P. Redmond, master:

I respectfully ask an allowance and that I be paid out of the fund in court the further sum of one thousand dollars for my services as attorney and counsel rendered to the receiver and in and about the business of the receivership.

During his whole term of service I acted as counsel for the receiver, giving constant care and attention to the business, giving him advice and counsel almost daily upon every question, simple or intricate, which arose for his consideration and decision. The fact that no fault has been found with the receiver's accounts or with his action in anything, and the success of the receivership, both in improving the property and accumulating the large fund in court, is the best evidence that my advice was carefully considered and sound. For all this labor I have been paid but one thousand dollars. My services were reasonably worth to the fund more than two thousand dollars, and I therefore respectfully ask that the further sum of one thousand dollars be allowed and paid me.

Respectfully, B. C. BROWN.

B. C. Brown, being sworn, says the facts above are true in substance and in fact.

Subscribed and sworn to before me April 17, 1884.

CHAS. P. REDMOND, *Master.*

Filed in master's office April 17, 1884.

CHAS. P. REDMOND, *Master.*

136 EXHIBIT R.

RUSSELL SAGE
versus
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY.

LITTLE ROCK, ARK., *March* 4, 1884.

Hon. Chas. P. Redmond, master:

During my receivership in the above-entitled cause I acted not only as receiver but also as general manager of all the business, thereby saving to the fund the salary of an outside general manager.

My salary as general manager has been fixed and is at the present time $6,000 per annum and all expenses when away on business for the company. This salary and the expenses I paid to myself during my receivership.

During my management I consolidated offices and reduced expenses, as shown in my report to the court.

I respectfully claim for my services as receiver the same compensation allowed Mr. R. K. Dow as receiver of the same property during his receivership thereof—that is to say, $7,500 per annum, which compensation was paid him out of a much less annual income than was received during my administration. This sum was allowed to him in addition to the salary of a general manager, which he paid out of the income of the road.

I was appointed receiver June 24, 1882, and turned over the property to the company under the order of the court December 1, 1883.

From this last date no salary as general manager was charged to the funds in my hands or paid out of it, but from December 1st until the day I paid the money in my hands into the court, February 14, 1884, I was constantly occupied in settling the business of the receivership and preparing my accounts and reports.

From June 24, 1882, to February 14, 1884—nineteen months and twenty days—at $7,500 per annum is $12,291.66. Of this sum I have paid myself $4,500, leaving due me $7,791.66.

I also claim payment for my services for the time in which I may be occupied in passing my accounts through the master's office and until my final discharge, at the same rate per annum.

If you should be of the opinion that my compensation should be fixed by a percentage upon the earnings and income of the property passed through my hands, which would be: Earnings during the time the road was in my hands as receiver, $1,277,341.51, to which should be added old accounts and balances collected by the receiver and the money turned over to the receiver June 24, 1882, less about $10,000, uncollected earnings, then I respectfully claim the commissions allowed in this State to trustees as provided in section No. 122 of Gantt's Digest.

While I am willing to accept in satisfaction for my services as receiver the salary first named, I am advised and believe that I am legally and equitably entitled to the commissions as last stated, and respectfully claim such commissions.

Respectfully yours, E. K. SIBLEY.

EXHIBIT S.

Circuit Court of the United States, Eastern District of Arkansas, in Chancery Sitting.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant. } No. 512.

MASTER'S OFFICE, *April* 4, 1884.

To counsel for the several parties in the above-entitled cause:

GENTLEMEN: You are hereby notified that the receiver in the above cause has filed his accounts in this office; that sched-
137 ules of his disbursements and receipts, with vouchers for the disbursements, are now in the master's office subject to your

inspection, objection, or exception; that the same have been examined by the master and no objection found to them. You are requested to examine the same and make objection or exception to such as you deem erroneous.

CHAS. P. REDMOND, *Master.*

We acknowledge service of the above notice this April 4, 1884.

S. R. COCKRILL,
For Sage.
U. M. & G. B. ROSE,
For Interveners.
B. C. BROWN,
For M. & L. R. R. Co.

EXHIBIT T.

Circuit Court of the United States, Eastern District of Arkansas, in Chancery Sitting.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant. } No. 512.

MASTER'S OFFICE, *April* 4, 1884.

We hereby enter our appearance in the master's office in the above-entitled cause for the purposes named in the orders of reference to the master of date February 14 and March 7, 1884.

S. R. COCKRILL,
For Sage.
U. M. & G. B. ROSE,
For Interveners.
B. C. BROWN,
For M. & L. R. R. Co., as Reorganized.

EXHIBIT U.

Schedule of Legal Expenses.

June and July, 1882:

Voucher	3, R. L. Goodrich, clerk's fees	$4 30
"	4, R. L. Goodrich, clerk's fees	17 50
"	70, J. W. Cameron, Washington, D. C., attorney's fees	350 00
Voucher	100, J. H. McKenney, clerk U. S. Supreme Court	100 00

August, 1882:

Voucher	203, P. R. Athey, sheriff at Memphis	19 58

September, 1882:

Voucher	93, P. R. Athey, sheriff at Memphis	16 50
"	200, J. W. Callaway, clerk's fees, Sage *vs.* R. R.	50 00

October, 1882:

Voucher 58, A. H. Ferguson		30 00
" 134, J. M. Rose		25 35
" 154, Geo. Sibley		11 50

November, 1882:

Voucher 21, W. R. Dunlap, clerk's fees		8 80
" 279, J. L. Bay, clerk's fees		31 00

December, 1882:

Voucher 174, R. L. Goodrich, clerk's fees		77 22

138 January, 1883:

Voucher 53, Malone & Watson, attorneys' fee		57 10
" 109, J. W. Callaway, transcript, Sage *vs.* R. R		28 00
" 235, M. T. Williamson, U. S. marshal		78 42

February, 1883:

Voucher 278, Harris, McKissock & Turnley, attorneys' fees		250 00

March, 1883:

Voucher 221, George Sibley, costs		85

April, 1883:

Voucher 106, J. M. Stewart, copies		6 50

May, 1883:

Voucher 6, E. J. Butler		10 00
" 57, Jefferson Branch		2 50
" 83, George Sibley		13 25

July, 1883:

Voucher 261, Morgan & McFarland		200 00

August, 1883:

Voucher 174, T. E. Gibbon		4 00

September, 1883:

Voucher 230, L. E. Barber		1 05

October, 1883:

Voucher 168, George Sibley		1 75
" 212, C. L. Eggleston		8 00
" 215, A. D. Beach		12 00
" 274, W. G. Weatherford		81 50
" 275, J. M. Rose		12 50

November, 1883:

Voucher 182, J. M. Stewart, clerk's fees	22 15
" 214, B. C. Brown	1,000 00

December, 1883:

Voucher 37, J. L. Bay, clerk	31 55
" 117, W. R. Thomas	8 95
" 265, George Sibley	250 00
Legal expenses	$2,821 82

Judgments Paid.

M. M. Buck, voucher 56, December, 1882	$1,650 00
W. I. Darby, voucher 227, January, 1883	107 10
John Z. Carl Lee, voucher 32, February, 1883	38 50
Cyrus Bussey, voucher 36, February, 1883	616 75
J. Z. Carl Lee, voucher 37, March, 1883	70 50
Total judgments paid	$2,482 90
Legal expenses	2,821 82
Total legal	$5,304 72

139 EXHIBIT V.

Receiver's Oath to his Accounts.

Circuit Court of the United States, Eastern District of Arkansas, in Chancery Sitting.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant. } No. 512.

MASTER'S OFFICE.

E. K. Sibley, being first duly sworn, deposes and says: I was the receiver of the "Memphis and Little Rock Railroad Company (as reorganized)" from June 24, 1882, to November 30, 1883; that the thirty-seven schedules, Exhibits A 1 to A 19 and B 1 to B 18, filed by me with the master and forming part of this report, and signed by me and by John W. Goodwin, secretary, contain a correct statement of all my receipts and disbursements as receiver of said railroad and a true account of all and every sum and sums of money received by me or by any other person or persons by my order or, to my knowledge or belief, for my use on account or in respect of the incomes and revenues and profits of said railroad during my receivership.

And I further state that the several sums of money mentioned in said exhibits and the vouchers filed therewith as having been paid or allowed by me were actually and truly so paid and allowed for the several purposes respectively in said accounts mentioned, and that said accounts are just and true in all and every the items and

particulars therein contained, according to the best of my knowledge and belief, and that the vouchers filed with said accounts are in all respects true and *bona fide* vouchers.

E. K. SIBLEY.

Subscribed and sworn to before me this 12th day of April, 1884.

CHAS. P. REDMOND,
Master and U. S. Commissioner.

EXHIBIT W.

To U. M. & G. B. Rose, solicitors for interveners, and B. C. Brown, solicitor for defendant:

Take notice that in pursuance of a rule of the United States court for the eastern district of Arkansas, and of a commission issued in conformity thereto, in a certain case there pending, wherein Russell Sage is plaintiff and Memphis and Little Rock Railroad is defendant, I shall proceed on the ninth day of April, 1884, between the hours of 9 a. m. and 6 p. m. of said day, at the office of George H. Shields, in the United States post-office building, in the city of New York, in the county of —, in the State of New York, to take depositions of witnesses, to be read as evidence on the trial of said cause, when and where you may attend, if you think proper; and the taking of depositions under this, if not completed on said day, will be continued over from day to day thereafter at the same place and between the same hours until concluded.

Given this fifth day of April, A. D. 1884.

RUSSELL SAGE,
By S. R. CO' KRILL, *Attorney.*

Service of the within notice is acknowledged.

U. M. & G. B. ROSE,
For Interveners.
B. C. BROWN,
For Memphis and Little Rock Railroad Company, as Reorganized.

140 United States Circuit Court, Eastern District of Arkansas.

RUSSELL SAGE

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized).

MASTER'S OFFICE.

Ordered, That a commission issue to take depositions on part of plaintiff before George Shields, of New York, depositions to be returned to master's office, to be taken in pursuance of annexed notice.

April 5th, 1884.

CHARLES P. REDMOND, *Master.*

UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

The President of the United States of America to George Shields, Greeting:

You are hereby commanded to cause to come before you all witnesses whatever and them diligently examine, as well on the part of plaintiff as of the defendant, in a certain suit now pending in our circuit court for the eastern district of Arkansas, in which Russell Sage is plaintiff and The Memphis and Little Rock Railroad Company (as reorganized) is defendent; that you then and there examine them apart, upon their respective corporeal oaths, first taken before you, and that you reduce their examinations to writing, and when you shall have so taken them that you send the same with this commission closed up under your seal to our said circuit court, at the city of Little Rock, without delay.

In testimony whereof Hon. Morrison R. Waite, Chief Justice of the United States, hath caused the seal of said circuit court to be hereunto affixed this third day of April, A. D. 1884, and of American independence the one hundredth and eighth year.

Attest:

[SEAL.] RALPH L. GOODRICH, *Clerk.*

The execution of the within commission appears from certain schedules hereunto annexed.

JOHN A. SHIELDS,
United States Commissioner and Master in Chancery,
Duly Appointed by the Circuit Court of the
United States for the Southern District of New York.

United States Circuit Court, Eastern District of Arkansas.

RUSSELL SAGE and Others, Complainants,

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized).

Depositions taken on the part of plaintiffs, in pursuance of the annexed notice, before John A. Shields, Esq., master, Saturday, April 12, 1884.

Appearances: Melville Egleston, Esq., for the plaintiffs; John M. Bowers, Esq., for defendants.

It is stipulated and agreed by and between the attorneys for the respective parties that these depositions shall have the same
141 force and effect as if John A. Shields had been correctly named in the notice and as if the taking of the same had been had on the ninth instant, the same having been adjourned by mutual consent to this date and the said John A. Shields being the commissioner intended in the said notice. It is also stipulated that the evidence be taken by a stenographer, the signing thereof as well as the reading over being waived.

X Q. 14. It has been due some months, has it?

A. I think it was due for a month or two.

X Q. 15. You have been pressing them for payment.

A. Yes, sir.

X Q. 16. In what way?

A. Calling on Mr. Marquand, who was the man I looked to for payment; he was the president of the company at the time.

143 X Q. 17. What excuse did he give for not paying?

A. The earnings were not sufficient; they were not in funds to enable him to pay it.

X Q. 18. Did you believe him?

A. I did.

X Q. 19. Did you threaten suit or anything of that sort?

A. I don't know that I threatened him, but I expressed great disappointment at the note not being paid.

X Q. 20. Were your relations amicable, or were they those that would naturally arise from a creditor pressing a payment and a debtor neglecting to pay it?

A. You have expressed it exactly.

X Q. 21. You were not absolutely hostile, but you were not friendly?

A. Yes; I was certainly disappointed at his not paying the note.

X Q. 22. And you so expressed, did you?

A. Yes, sir.

X Q. 23. How did you happen to make those loans originally?

A. I was interested in the property, and I had been led to believe that this was much better property than it turned out to be through Mr. Marquand; I was interested in the Iron Mountain road, and we purchased some stock from him; we found the earnings of the road and its condition much worse than we expected.

X Q. 24. When had you found this out?

A. I found it out——

X Q. 25. (Interrupting.) Had you found it out at that time, when he didn't pay the note?

A. I found it out then; I made investigations; I knew the thing was running behind, at least I was told so by our railroad men out there, and, of course, was anxious about the payment of my note.

X Q. 26. Were any suggestions of settlement or compromise made between you and Mr. Marquand about that unpaid balance of money?

A. No, sir; I tried to get it in various ways; I made a subscription for some stock, to see if I couldn't work it in that way, and they declined to receive it.

X Q. 27. Wouldn't do anything at all?

A. No, sir; he wouldn't receive it, and made considerable of a feeling between us.

X Q. 28. Did you suggest any other way?

A. No; I suggested that way, and I thought it was very unfair on his part not to enable me to apply it on the payment, so I didn't take the amount of stock that was allotted me.

X Q. 29. Really, he wouldn't do anything?

A. No, sir; he refused paying it absolutely.

X Q. 30. I understand, with these persistent refusals on his part and demands on yours for payment and your knowledge of the bad condition of the road, you purchased this second note for $115,000?

A. Yes, sir; I bought that as I would anything else—fifty cents on the dollar.

X Q. 31. And yet it happened that almost immediately after Mr. Marquand changed about and assisted you to obtain judgment on that note?

A. I don't know anything about his assisting me.

144 X Q. 32. You did get judgment by confession?

A. I got it; I don't know anything about how I got it; I don't know that Mr. Marquand aided me.

X Q. 33. Don't you know that defendant did confess judgment?

A. Yes, sir; I judge that was the best way out—for him to get out of it. I loaned him this money in the first place as a personal matter, supposing Mr. Marquand would see that it was paid at its maturity.

X Q. 34. He hadn't kept that promise?

A. Well, he hadn't kept the promise; he said he only acted in behalf of the company, not personally.

X Q. 35. How do you account for the change of base that came about so suddenly?

A. I gave you the only reasons from what I have stated here.

X Q. 36. Did you ever know an instance before in which a debtor confessed judgment, except the relations were friendly?

A. Oh, yes; I have known a good many. I have had cases where men were very glad to get over a rough place by making a confession just as they did; sometimes make an assignment to get the protection of the court, hoping something favorable will turn up in the future; it is a very common thing in the course of business.

X Q. 37. In this particular instance you paid out something better than $50,000 for the second obligation, didn't you?

A. No; more than that; about $57,000.

X Q. 38. To whom did you pay that?

A. I bought it of the Missouri Pacific railroad.

X Q. 39. To whom did you pay the money?

A. I made my liability to the company.

X Q. 40. In what way?

A. On demand.

X Q. 41. What did you give them?

A. Gave them my obligation for it.

X Q. 42. Your note?

A. No, sir.

X Q. 43. What did you give?

A. I gave them, as I said, my obligation—that is, payable now, on demand. I haven't paid it.

X Q. 44. It is not paid yet?

A. No, sir.

X Q. 45. What kind of an obligation is it?

A. A personal obligation, payable on demand.

X Q. 46. Is it written—is it in writing?

A. I haven't a copy of the result; they agreed to sell it and I said I would pay it on demand.

X Q. 47. Did they ever attempt to enforce it against you?

A. They delivered their note to me and I agreed to pay the treasurer any time he calls for it.

X Q. 48. You agreed to pay him $57,000, with interest?

A. I did.

X Q. 49. Have they got any means of enforcing it?

A. They have got the action of their own board.

145 X Q. 50. How does the action of their board make you liable for anything?

A. It makes me liable if I agree to pay it; I take the property and I am liable for it.

X Q. 51. Have they got an agreement?

A. Yes, sir; they have got an agreement; I made it payable to the treasurer.

X Q 53. Who is he?

A. Mr. Gould and Mr. Calif, the president and treasurer.

X Q. 54. Have they ever asked payment of it?

A. No, sir.

X Q. 55. Have you ever paid any interest on it?

A. No, sir.

X Q. 56. When did you hear of that obligation being in existence?

A. Well, in the office; I don't remember completely now.

X Q. 57. What office?

A. In the Iron Mountain office, and in connection, perhaps, with my conversation with Mr. Marquand; I don't remember now; it is some time since.

X Q. 58. The St. Louis and Iron Mountain were quite large stockholders in that road—the Memphis and Little Rock?

A. Yes, sir.

X Q. 59. They held pretty much all the stock?

A. Yes, sir; they bought the stock from Mr. Marquand.

X Q. 60. What did they pay Mr. Marquand for that stock?

Objected to.

Answer. I don't remember now.

X Q. 61. Have you any means by which you could ascertain what they paid Marquand for that stock?

Objected to.

A. No more than by reference to the books of the Missouri Pacific Company.

X Q. 62. Have you any access to those books?

A. The treasurer is here, subpœnaed as a witness in this case, and you can get all the data from him; I haven't got it.

X Q. 63. Could you ascertain it if you wanted to?

Objected to by plaintiff's counsel, and the witness is instructed for the present not to answer.

X Q. 64. Did you make any agreement with any person, before you purchased that second note, as to the payment of either that or the money then due you on the first note by which any means were to be taken for its recovery?

A. No, sir; I made no agreement with any one, except I bought the note, and I proceeded to try to collect the two.

X Q. 65. Was there any agreement made by which the company was to pass judgment?

A. No, sir; I never made any.

X Q. 66. Was any suggestion of that sort made?

A. No, sir; I knew of none at the time; I just bought it.

X Q. 67. Where did this transaction take place—this purchase?

A. I don't know whether it was in my office or in the office of the Missouri Pacific Company.

146 X Q. 68. In this city?

A. Yes, sir; in this city.

X Q. 69. What is the difference between your office and the Missouri Pacific?

A. Well, one is 195 Broadway and the other is 71 Broadway.

X Q. 70. Which is which?

A. Mine is 71 Broadway and the Missouri Pacific is in the Western Union Building, 195 Broadway.

X Q. 71. Who were present?

A. Well, I don't remember distinctly, but I think the treasurer and the president were present, Mr. Gould and Mr. Calif.

X Q. 72. Anybody else?

A. I don't remember now of any one else.

X Q. 73. How many discussions were had on the subject?

A. Well, I think perhaps two or three.

X Q. 74. The first transaction was before the resolution, was it not?

A. Yes, sir.

X Q. 75. Do you remember the date of any of those transactions?

A. I do not.

X Q. 76. Do you know where those books are now in which those entries were made?

A. What books do you mean?

X Q. 77. The entries as to this sale?

A. Well, I think they are in—I presume they are in the office of the company.

X Q. 78. That purchase was made from the Missouri Pacific?

A. Yes, sir.

X Q. 79. Do you know anything about the consideration for the note that the Missouri Pacific held and that you purchased?

A. Mr. Calif, who is present, can answer that.

X Q. 80. Did you hold for the St. Louis and Iron Mountain a large part of the stock of this road?

A. No, sir; I was the former owner of the stock in the Iron Mountain road.

X Q. 81. Didn't a large quantity of the stock of the Memphis and Little Rock stand in your name as trustee at some time or another?

A. I think it did; it may have stood in my name in connection with Mr. Marquand's.

X Q. 82. Or, perhaps, Mr. Gould?

A. Well, I don't know—one or the other.

X Q. 83. Do you know anything about the transaction at the time, about the stock standing in your name as trustee?

A. Yes, sir; I consented to have it put in my name; I don't think I owned a share of Memphis and Little Rock stock in my life.

X Q. 84. But you had, as trustee, held a considerable amount?

A. Yes, sir.

X Q. 85. For whom were you trustee?

A. I was trustee to hold the stock as a muniment for title by the Missouri Pacific Railroad Company.

147 X Q. 86. Bought for whom?

A. Various persons—that stock was bought mainly from Mr. Marquand.

X Q. 87. Do you know anything about the transaction at the time of the purchase?

A. I knew that negotiations were going on with the president of the Missouri Pacific.

X Q. 88. Were you an officer of the Missouri Pacific?

A. Yes, sir; I was a director.

X Q 89. Does that stock still stand in your name?

A. I believe so.

X Q. 90. Is it in your name as trustee for the Missouri Pacific or as trustee for the St. Louis and Iron Mountain?

A. Iron Mountain.

X Q. 91. You had never personally examined the road at the time you made these loans or purchased that note from the Missouri Pacific?

A. No, sir.

X Q. 92. Have you any personal knowledge as to the consideration for that note held by the Missouri Pacific which you purchased, or must you refer entirely to the evidence of one of the officers of the company on that point?

A. I refer to the officer of the company as giving it more accurately than I could.

X Q. 93. I would like your impression very much.

A. Just from recollection?

X Q. 94. What is your recollection?

A. I don't remember distinctly about it.

X Q. 95. Did you make any inquiries at the time you purchased the note?

A. Well, I may have done so and I think I did.

X Q. 96. Is there any agreement existing between you and the Missouri Pacific by which, if you collect the entire amount, you are to return the entire amount to them?

A. No, sir.

X Q. 97. Are you to keep it for your own use?

A. Yes, sir; I bought it absolutely.

X Q. 98. And do you mean to say that that exists and you are an officer of the Missouri Pacific?

A. Yes, sir; I do.

X Q. 99. Don't you know that that is an illegal transaction?

A. I do not.

In justice to myself, having refreshed my memory, I wish the stenographer to take the following statement: The notes that I took from the Memphis and Little Rock road for money loaned were not paid at maturity, and the president or Mr. Marquand or the treasurer or some officer wrote that he would pay in installments of $10,000 a month, and I think he paid two installments and then did not pay at the time; the receipts were not sufficient to enable him to pay, my recollection is, the third one, and finally didn't pay at all; ceased to pay and ran along for several months without any payment whatever, and it ran down to the latter part of June, 1882, when I purchased this note and resolved in my own mind to put it in the course of collection and see the end of it, if possible. I
148 was going to collect the sum, and I was willing to take the risk of the new purchase and put it in with the balance due on my notes of money loaned, and I did so.

X Q. 100. What risk did you take on any purchase?

A. Well, I took the risk of collecting; I have not collected anything.

X Q. 101. You have never paid anything?

A. Yes, I have; I am ready to pay it this afternoon; if Mr. Calif should send now I am willing to pay it.

X Q. 102. They haven't pressed you as much as you did the Memphis and Little Rock?

A. No, sir; because they know, I suppose, or think I am responsible to respond when they call upon me.

X Q. 103. And you didn't think the Memphis and Little Rock was?

A. I knew they were not; I thought they were when I loaned them the money; I was disappointed.

X Q. 104. But you didn't think so when you bought this note, that they were responsible?

A. No, sir; I thought they were in doubtful credit and bought the paper accordingly.

X Q. 105. What did you do with it after you bought it?

A. I sent it for collection.

X Q. 106. To whom?

A. To the counsel; I gave it over to Dillon & Swayne to send forward to the counsel they employed in Little Rock.

X Q. 107. Do you know what counsel they sent it to in Little Rock?

A. I have got his name, but not here with me.

X Q. 108. Was it Mr. Brown?

A. Mr. Brown.

X Q. 109. You knew at the time Dillon & Swayne were the attorneys here and Mr. Brown the attorney at the time in Arkansas for the defendant?

A. Yes, sir; I knew Dillon & Swayne were here.

X Q. 110. You knew at the time Dillon & Swayne were the attorneys here for the Memphis and Little Rock?

A. Yes, sir.

X Q. 111. And Mr. Brown was attorney for the Memphis & Little Rock in Arkansas?

A. I knew they did some business with him.

X Q. 112. Didn't you know they were the attorneys for the road at that time?

A. I don't know as I knew what their relations were to the Memphis and Little Rock.

X Q. 113. Didn't you know there was a suit pending that they instituted to set aside the bonded debt of the road brought at that time?

A. It occurs to me now that there was some such suit.

X Q. 114. What did you know about that suit?

A. Only general knowledge.

X Q. 115. What is it that occurs to you now about it?

A. Nothing clear or definite about it.

X Q. 116. Were you a party to that action?

A. No, sir.

X Q. 117. Did you ever see the bill in it?

A. I don't remember that I ever did.

149 X Q. 118. You knew, did you not, at that time that Dillon & Swayne were prosecuting that suit for the Memphis and Little Rock road?

A. I have no recollection of it.

X Q. 119. Do you know Dillon & Swayne?

A. I know them; yes, sir.

X Q. 120. They were the attorneys for the Missouri Pacific, weren't they?

A. Yes, sir.

X Q. 121. And also for the St. Louis and Iron Mountain?

A. Well, I don't remember distinctly.

X Q. 122. And you don't know whether they were the attorneys for the Memphis and Little Rock or not?

A. No, sir; I do not.

X Q. 123. Then you are not at all surprised to find that you turned your notes over to the attorneys for the road you wanted to prosecute, both here and in Arkansas?

A. I employed Dillon and Swayne to do business for me in other things.

X Q. 124. And they did it with wonderful success in this case, getting a receiver immediately?

A. That was what I desired to be done.

X Q. 125. You know that was done on consent, don't you?

A. I know that Mr. Brown wrote me acknowledging the receipt of my letter and that he had succeeded in getting the judgment.

X Q. 126. Do you really mean to say that at the time you purchased that note you had no idea the defendant in that action was going to assist you in obtaining a receiver and the immediate possession of that road?

A. I mean to say that I bought that claim with the intention of prosecuting it just as faithfully as I ever prosecuted anything that I owned in my life.

X Q. 127. For what purpose?

A. For the purpose of collecting and making the money.

X Q. 128. On the claim?

A. On the claim.

X Q. 129. Have you ever done it yet?

A. No, sir.

X Q. 130. Not a penny?

—. I never received a dollar on my debt.

X Q. 131. And you have never paid a dollar on it?

A. It was money loaned.

X Q. 132. On this purchase?

A. The judgment is for the work.

X Q. 133. Did you ever have any conversation with Mr. Gould or Mr. Marquand upon the subject of this receivership that you obtained on your judgment?

A. I don't remember whether I had any conversation or not; I may have had a conversation with both of them.

X Q. 135. Did you agree with them?

A. No, sir; I put it in the hands of Mr. Brown to prosecute and collect.

X Q. 136. What authority had Mr. Gould to offer you a judgment for sale?

Objected to, as it has not been shown in any way he ever did offer.

Answer. I have no recollection of any conversation about selling it.

150 X Q. 137. You recollect, do you not, that at one time there was a discussion had here between the bondholders and the officers of the road as to the possible settlement of the existing lawsuits?

A. Well, that was carried on, perhaps, by Mr. Gould; I knew there had been several attempts to adjust matters to a compromise.

X Q. 138. Do you know Mr. Hayes?

A. Yes, sir.

X Q. 139. Do you know him at all well?

A. I know him well.

X Q. 140. You are aware, are you not, that as a basis of compromise, among other things, he offered your judgment to the bondholders?

A. Well, he may have been authorized; some other party may have authorized him to have done that with a view to pay me for the same.

X Q. 141. Did you authorize him to do that?

A. I don't remember anything at all; I should have undoubtedly carried out any arrangement Mr. Hayes made; I think he is a very honest and capable man; if he had made any such arrangement as that, that would have been a short cut for me to get my pay, I suppose.

X Q. 142. He is an officer of the Missouri Pacific road?

A. Yes, sir; he is general manager of the road.

X Q. 143. He has been for a number of years?

A. Yes, sir.

X Q. 144. Did you ever have a letter direct from Mr. Brown about the proceedings to be taken to collect your notes?

A. Yes, sir.

X Q. 145. How soon after you sent your notes out did you get such communication from him?

A. Well, in a very few days.

X Q. 146. What was the tenor of that communication?

A. Well, that he had received these notes and that he would proceed to collect them as soon as he possibly could, and he should move for an application for a receiver and thought he should succeed in it.

X Q. 147. Has he ever advised with you since upon the subject?

A. Well, he has through others; I rather think I had one letter from him since.

X Q. 148. The result of that proceeding was to keep the road out of the possession of a receiver for some time and not pay anything on your claim, wasn't it?

A. Well, I don't know what the result was; I haven't collected my debt, I know.

X Q. 149. None of it?

A. No, sir.

X Q. 150. Has he ever written you upon that subject or advised you upon it, as to why he hasn't collected anything?

A. Well, I have got a general knowledge of what was the trouble—the litigation there; there has been a continuous effort made, as I recollect, to adjust this thing with the bondholders down to within a very short time.

X Q. 151. Have you had any knowledge of that?

A. I have not carried on the detail; I have taken no part in it.

X Q. 152. Have you any general knowledge of it?

A. Yes; I have had a general knowledge of the difficulties.

151 Mr. Hayes and Governor Brown have been here and they have told me the difference about the negotiation, and there has been once or twice when they thought they were near together and were to get things all adjusted, but I have not had charge of that part of the business. I have let this thing drift along in the hands of my counsel out there and our people here with the expectation and hope that a compromise would be reached.

X Q. 153. Have you any other counsel other than Mr. Brown?

A. No, sir.

X Q. 154. That is the only counsel you had in Arkansas?

A. Yes, sir.

X Q. 154½. And in this matter have you consulted any counsel in New York at all?

A. No, sir; only I had a talk with Dillon & Swayne, as I said.

X Q. 155. And they are the only ones?

A. Yes, sir.

X Q. 156. What do you understand the object of the proceeding in which you are now giving evidence to be?

A. Well, it is simply, as I understand it, they have made a motion out there—my counsel has made the application for those surplus funds on hand to pay my judgment; their receiver wants to know whether it is in good faith, which is what they are trying to get at here now; a suspicion has been raised that they never owed me anything; I have heard so.

X Q. 157. Where did you hear that suspicion?

A. Nothing, only a mere rumor report; I never heard anything myself; I put it in the hands of counsel and had confidence in him or I shouldn't have put it in his hands.

X Q. 158. From whom did you hear such report?

A. Generally; I think I heard it from Mr. Cossett on the opposite side; he said that they were going to blow up the whole concern here; they had got the road back again and were going to do wonders; not once, but other times; told me within the last ten days how they expected to have the road back again and that he had a very valuable thing, and that the Missouri Pacific had made a great mistake in not paying up the back interest and the debt to the State, and all sorts of things. I didn't make much reply, for I found he was in a frame of mind it wasn't pleasant to talk with him.

X Q. 159. You pretty effectually stopped his doing wonders?

A. Well, I don't know what wonders he contemplated.

X Q. 160. How did you pay the original $40,000 you loaned the company?

A. I gave my check for the amount and five per cent. interest.

X Q. 161. To whose order?

A. To the order of the president of the company.

X Q. 162. Is that check in existence?

A. Yes, sir.

X Q. 163. You wouldn't have any objection to producing it?

A. No; I presume it can be found; it was some years ago; I made the check to Mr. Marquand, I presume.

X Q. 164. Do you keep a regular set of books?

A. Yes, sir.

152 X Q. 165. Is there any entry in those books of this loan to the Memphis and Little Rock railroad?

A. Of these notes? Yes, sir.

X Q. 166. How was the payment made—on account?

A. Yes, sir.

X Q. 167. Is there any objection to showing us that?

A. I will bring it to you if you want it.

X Q. 168. I would like to see it.

A. I will do so.

X Q. 169. Was it your own money that was loaned?

A. It was my own money that was loaned.

Redirect by Mr. EGLESTON:

Q. 1. Don't you recollect putting your application to pay fifty cents on the dollar for the note you bought of the Missouri Pacific

Company in writing in a letter, which you addressed to that company?

A. Yes, sir; I did; I made an offer of that kind.

Q. 2. Was the proposition that you made in writing accepted by the company?

A. Yes, sir; that is my recollection. As I said, Mr. Calif is here; he has the record of the acts of the executive committee, I guess.

Q. 3. And that letter constitutes the written evidence of the contract on which you acquired the note?

A. Yes, sir.

Q. 4. At the time you bought the note, and some time prior to that, were you not largely interested in the Missouri Pacific?

A. Yes, sir.

Q. 5. Were you influenced at all in getting that note by that fact?

A. I was influenced to get the note to realize the balance due me and to get what I could out of this, and get the whole if I could.

Q. 6. You thought you would have a better chance?

A. Yes, sir; I thought it was a more respectable sum of money to enforce against a corporation than $16,000 or $17,000.

Q. 7. When you said a short time ago you would have probably carried out any arrangement made by Mr. Hayes for the settlement of the controversies in which this company has been involved with the bondholders and their trustees, did you mean by that that you would have abandoned in any way your right of your judgment against the company?

Objected to.

Answer. Not the slightest.

Q. 8. Explain a little more fully what you meant by carrying out any arrangement.

A. I meant that I thought it was desirable to reach a settlement with the bondholders in the Memphis and Little Rock road, and I thought it would be for their interest, and it would be for the interest of the Missouri Pacific road, in which I was interested also by that arrangement; I should have my judgment paid in full; I had no other feeling then and I have no other now.

Q. 9. You knew, did you not, as a director of the company, that the note which the Missouri Pacific held against the Memphis & Little Rock Railroad Company was given for a valuable consideration, did you not?

Objected to.

153 Answer. Yes, sir; I had no doubt of it then, or else I wouldn't have bought it, and I have no doubt about it now.

Q. 10. In regard to this suit that you brought out there, would you necessarily know, or are you sure that you know, who acted as your attorney in bringing that suit? In other words, may you not be mistaken in saying that Mr. Brown was the attorney who brought the suit?

A. Well, I don't remember about that; I would like to go home and refresh my memory about that.

Q. 11. Will you ascertain that fact, and if there is any correction to make insert it in your examination?

A. I will; yes, sir.

Adjourned to Tuesday, April 15, 1884, at 11 o'clock a. m.

RUSSELL SAGE.

Subscribed and sworn to before me this twenty-first day of April, 1884.

JOHN A. SHIELDS,
United States Commissioner and Master in Chancery,
Southern District of New York.

NEW YORK, *April* 15, 1884.

Met pursuant to adjournment.

Present: Counsel as before.

A. H. CALIF, being duly sworn and examined on behalf of the complainant, testifies as follows:

By Mr. EGLESTON:

Question 1. Mr. Calif, you are the treasurer of the Missouri Pacific Railway Company, are you not?

Answer. I am.

Q. 2. And was such treasurer in 1882 and 1883?

A. Yes, sir.

Q. 3. Do you know whether in June, 1882, the Missouri Pacific Railway Company had in its possession a note given by the Memphis and Little Rock Railroad Company (as reorganized) to the Missouri Pacific Railway Company?

Objected to unless the note is produced or its loss shown.

Answer. Yes, sir.

Q. 4. Is that note owned by the Missouri Pacific Railway Company now?

A. No, sir.

Q. 5. What was done with it?

A. It was sold to Mr. Russell Sage.

Defendant's counsel objects to all these answers and moves to strike them out unless the witness produces the records of the transactions from the books of the company.

Complainant's counsel states that that can be done at a later date, and that it will be done.

Q. 6. Do you remember the amount of the note?

A. One hundred and fifteen thousand and some odd hundreds; the exact dollars and cents I do not know.

154 Q. 7. Now, what was that note given for?

Objected to unless the witness produces the records of the company which will show it.

Answer. It was given for advances that the Missouri Pacific made to pay the coupons on the Memphis and Little Rock bonds.

Q. 8. Have you a copy of the account from the books of the Missouri Pacific Railway Company showing those payments?
A. Yes; the dates and amounts.
Q. 9. Will you produce it?
A. Yes.

The account is received, subject to comparison with the original books of the company, and is marked "Exhibit A, April 15, 1884"—J. A. S., commissioner.

Defendant's counsel objects to this paper as being on its face not a copy of any entries in the books of the company.

By Mr. BOWERS:

Question 10. This is not a copy?
Answer. No; that is merely a memorandum showing the payments and dates.
Q. 11. It does not purport to be a copy of the books of the Missouri Pacific?
A. Oh, no.

Defendant's counsel moves to strike the paper out as a statement made by the witness.
The statement is stricken out by consent.

By Mr. EGLESTON:

Question 12. That amount was advanced in installments at different dates, was it?
Answer. Yes, sir.
Q. 13. Can you state the amounts and the dates when such advances were made?

Objected to, without the production of the books.

Answer. I will give a copy of the account from the books showing these payments.
Q. 14. Now, Mr. Calif, do you remember the circumstances of the purchase of that note by Mr. Russell Sage?

Objected to as incompetent and irrelevant.

Answer. I do.
Q. 15. Will you state how the purchase was made?
A. On the twentieth day of June, 1882, Mr. Sage addressed a letter to the president of the company, offering him fifty cents on the dollar for the note.

Defendant's counsel objects to a statement of the contents of that letter unless it is produced.

Q. 16. Have you a copy of that letter here?
A. Yes.

The copy is received, subject to comparison with the original, and marked "Exhibit A, April 15, 1884"—J. A. S., commissioner.

Q. 17. What action, if any, was had by the company upon
155 the receipt of that letter?

A. The executive committee were called together and passed a resolution accepting Mr. Sage's letter.

Defendant's counsel objects to the statement of the contents of this resolution, except upon the production of the original.

Q. 18. Have you a copy of the record of the meeting of the executive committee and those resolutions?

A. Yes, sir.

Q. 19. Will you produce it?

A. Yes, sir; it has already been produced.

The copy is received, subject to comparison with the original.

Cross-examined by Mr. BOWERS:

X Question 20. Do you know anything about these advances, Mr. Calif, other than from the possession of the books of the company and the entries therein contained?

A. Well, in reference to the payments, do you refer to?

X Q. 21. No; in reference to the sale of this note to Mr. Sage.

A. Oh, no, sir.

X Q. 22. All you know is that such a letter was received and such resolutions adopted at the meeting of the board?

A. Yes, sir; I was secretary of the board.

X Q. 23. Did you have any consultation with Mr. Sage upon the subject?

A. Never a word.

X Q. 24. Did you with any other person?

A. No, sir.

X Q. 25. Did you know the object of making the sale?

A. No, sir.

X Q. 26. Did you keep the minutes at that time?

A. Oh, yes.

X Q. 27. And these are copies of the original minutes kept by you that have been offered?

A. Yes, sir.

X Q. 28. Did you know anything about the advancing of money by the Missouri Pacific to the Memphis and Little Rock, other than the entries in the books?

A. No, sir; only what I advanced myself.

X Q. 29. Did you advance any yourself?

A. Only as treasurer.

X Q. 30. To whose order were those checks drawn?

A. To the Central Trust Company.

X Q. 31. Have you the checks in your possession?

A. They ought to be.

X Q. 32. Have you the check book with stubs against which those checks were drawn?

A. Yes, sir.

X Q. 33. And those can be produced?

A. Yes, sir; the checks will take some time, because there are cart-loads of them.

X Q. 34. Will you make me a copy of the stubs opposite those respective checks?

A. Yes. Wouldn't you prefer the checks themselves?

X Q. 35. No; I think the stubs will do. You knew that that money was used by the Central Trust Company to pay coupons?

A. Certainly; because I got their return account and got my coupons back.

X Q. 36. Did the company hold one note, or was the amount represented by more than one note, this $115,000?

A. One note.

156 X Q. 37. How long had it been running?

A. I commenced my payments on the last day of February.

X Q. 38. And you completed them when?

A. And I completed them—I paid up to December.

X Q. 39. What year?

A. 1882.

X Q. 40. What was the first payment?

A. $70,000.

X Q. 41. And the last?

A. $9,192.06.

X Q. 42. What was the date of the first payment?

A. February 28.

X Q. 43. And the next?

A. May 1.

X Q. 44. How much?

A. Ten thousand.

X Q. 45. And the next?

A. May 15.

X Q. 46. How much?

A. $32.50.

X Q. 47. And the next?

A. July 19, $80.56.

X Q. 48. Then at the time this note was sold to Mr. Sage the company had only advanced $80,032.50, had it not?

A. What is the date of that note? It is 1883, isn't it?

X Q. 49. The resolution appears to have been adopted on the twentieth of June, 1882.

A. What is the last amount you have there?

X Q. 50. May 15, $32.50.

A. I can tell you how that was. I think Mr. Marquand paid some of those coupons, and I did not pay him until he rendered his account afterwards. My stubs will show that—my checks.

X Q. 51. Was Mr. Marquand an officer of the Missouri Pacific?

A. No, sir.

X Q. 52. Had you paid him the money?

A. I think some of that was paid to him.

X Q. 53. Had you paid him anything over the amounts your checks show?

A. No.

X. Q. 54. Then the balance of this money had not been advanced at that time by the Missouri Pacific Railway Company?

A. No; because I have these dates here of the times I drew checks.

X Q. 55. You don't know anything of these transactions except what your books show, Mr. Calif?

A. No.

X Q. 56. And the books show, do they not, that on the twentieth day of June the company was said to have a note for $115,479.03, given by the Memphis and Little Rock Railroad Company, and they had only advanced $80,032.50 that the books show?

A. That the books show at that date.

X Q. 57. Have you a copy of that note?

A. No; I have not.

X Q. 58. Have you any means of getting one?

A. I think I can.

X Q. 59. Do you remember who it was signed by?

A. No, sir; I do not.

X Q. 60. Do you remember the date it bore?

A. I have got a paper there that states that, doesn't it?

157 X Q. 61. I think it does. (Handing witness paper.)

A. I don't remember. It doesn't state here.

X Q. 62. Mr. Sage had not, up to Saturday last, paid the Missouri Pacific Railroad Company anything, had he, for that note?

A. No, sir.

A. H. CALEF.

Subscribed and sworn to before me this twenty-first day of April, 1884.

JOHN A. SHIELDS,
United States Commissioner and Master in Chancery,
Southern District of New York.

RUSSELL SAGE, recalled, corrects his evidence as follows:

The answer to the first question on the cross-examination, instead of reading "It must have been in the early part of 1882," should read "June 15, 1881."

In the answer to the sixth question, on the same page, the amount 40,000 should have been 30,000.

The sixty-fifth cross-question should read: "Was there any agreement made by which the company was to 'confess' judgment instead of 'pass' judgment?"

The answer to the one hundred and sixth cross-question, instead of "I gave it over to Dillon & Swayne to be sent forward to the counsel they employed at Little Rock," should be, "I sent it to S. R. Cockrill, an attorney employed by me at Little Rock." I was mistaken in that and also about Mr. Brown being counsel. I confused his name with the name of S. R. Cockrill. I sent this to Mr. S. R. Cockrill, inclosing it to J. C. Brown, of St. Louis. Mr. Brown is no counsel of mine and never has been, but is counsel for some of our roads down there—the Southwestern system—to send this to some competent attorney that he knew of in Little Rock for collection,

and I have Mr. Cockrill's acknowledgment of the receipt of my letter to him. I was confused in stating Mr. Brown's name for Mr. Cockrill as my attorney there. I never had any Mr. Brown as attorney there. There is a B. C. Brown there. I have never met him, and I have never employed him, and I have never employed Mr. J. C. Brown as my attorney, only I met him and I asked him as to who was a good man to send it to, and I sent it to Mr. Cockrill.

In the answer to the one hundred and twenty-fifth cross-question the name Mr. Brown should read Mr. Cockrill.

Defendant's counsel objects to the change being made, because there is no doubt that the witness used the word Brown at the time, but states that he has not the slightest objection to his saying he is mistaken.

The WITNESS: I was mistaken in saying Mr. Brown wrote acknowledging the receipt of my letter; it was Mr. Cockrill. I found after my examination on Saturday, in looking over the pa-
158 pers in this matter, a letter from S. R. Cockrill, acknowledging the receipt of my letter of June 26, 1882.

The witness produces letter of Mr. Cockrill and a copy of his letter to which Mr. Cockrill's letter is an answer.

They are marked, respectively, "Exhibits B and C, April 15, 1884"—J. A. S., commissioner.

On the twentieth page the last word of cross-question 132 should be "whole" instead of "work."

On the same page the answer to cross-question 135 is wrong. I wish to say I was mistaken in saying that I put it in the hands of Mr. Brown to prosecute and collect. I should have said I put it in the hands of Mr. Cockrill to prosecute and collect.

On the twenty-second page, in the answer to the one hundredth and forty-fourth cross-question, I made a similar mistake in the name. The letter referred to was from Mr. S. R. Cockrill, and it was the letter which I have produced.

The one hundredth and forty-eighth question should read, "The result of that proceeding was to keep the road in the possession of the receiver," instead of "out of the possession of the receiver."

I wish to correct all through my evidence the statement that Mr. Brown was my counsel in Little Rock in that matter. Wherever I so stated I was mistaken. Mr. Cockrill was my counsel.

On page 25, in the answer to the one hundredth and sixtieth cross-question, I was mistaken in referring to the original amount as $40,000. It should be $30,000. It was secured by two notes of $15,000 each. I was in error as to the interest I was to receive in saying five per cent. It was six per cent. interest.

Recross by Mr. BOWERS:

R. X Q. 1. You are going to produce copies of some accounts in your books and some checks for me, Mr. Sage?

A. Yes, sir.

R. X Q. 2. Have you done so?

A. I have it in my hand.

R. X Q. 3. May I have it?

A. Yes, sir (produces account).

R. X Q. 4. It appears from this account, Mr. Sage, that that loan was made at one time by the purchase of a note, wasn't it, or two notes?

A. Two notes; yes, sir.

R. X Q. 5. Now, you actually bought those two notes?

A. Discounted for them at six per cent. interest.

R. X Q. 6. What length of time had those notes to run?

A. Five months.

R. X Q. 7. These notes came due in November, 1881?

A. Yes.

R. X Q. 8. And when they came due?

A. He had written me proposing to pay the installments, and then he paid, on December 13, $5,000.

R. X Q. 9. Which left, with interest, $10,087.50 as of De-
159 cember 28, 1881?

A. Yes, sir; that was due the eighteenth of November and the other was due the sixth of December.

R. X Q. 10. What other was paid besides the $3,000?

A. That was all, except he paid the entire balance of the first on December 28, and the cash payment was made December 13, not December 28.

R. X Q. 11. And that left one note for $15,000, on which nothing has been paid?

A. Yes, sir; and which is due me now, with interest from November 23, 1881.

The witness also produces a check dated New York, June 30, 1881, drawn on the Importers' and Traders' National Bank, payable to H. G. Marquand, president, for $20,282.50.

R. X Q. 12. That note is indorsed, "Pay to the order of E. K. Sibley, general manager; H. G. Marquand, president." The next is, "Pay to the order of John W. Goodwin, treasurer; E. K. Sibley, general manager." After that is the indorsement, "John W. Goodwin, treasurer," and then follow, "Pay to the order of C. L. Hutchins, cashier, for collection, account of Merchants' National Bank. P. K. Roots, cashier." Who was Mr. Sibley?

A. I don't know. I suppose Sibley was an employé of the Memphis and Little Rock road.

R. X Q. 13. Who was Mr. Goodwin?

A. I don't know. He is some banker out there—I don't know him—to whom it passed through by the officers of the Memphis and Little Rock road.

R. X Q. 14. From what book is this paper copied?

A. It is made by my cashier from the transaction. I directed him to make up these things.

R. X Q. 15. From what book is this statement copied?

A. The statement was written out at the time and laid aside in an envelope as a history of the transaction.

R. X Q. 16. You keep books of account?

A. Yes, sir.

R. X Q. 17. Is there any entry in your books of which this paper is a copy?

A. I think the notes were entered on the bills receivable. My check book will show the stubs, of course, about that check.

R. X Q. 18. I know it, but you have brought here to-day an account, which, I suppose, is copied from something?

A. Oh, yes; that is copied; that is the transaction itself taken from the books of the bills receivable.

R. X Q. 20. Is it a copy of any book in your possession, or is it an original paper made up by your clerk?

A. It is a paper that I directed him to make up and I told him to keep it in an envelope by itself.

R. X Q. 21. When did you tell him to do that?

A. I told him back there.

R. X Q. 22. 1881?

A. 1881 or 1882.

R. X Q. 23. Was this paper that I now hold in my hand made at that time or written yesterday?

A. I wouldn't be positive about that. I told Mr. Osborn, my bookkeeper, to make up that statement. I have no doubt of that being taken from the bills receivable.

160 R. X Q. 24. It is your impression that it is a paper your clerk made up and is not a copy of any books in your possession?

A. I think it is a copy from the notes and payments.

R. X Q. 25. You and I misunderstand each other. Is this a statement that your clerk has made up of the transaction as he understands it, by working it out from entries in your books, or is it an exact copy of some paper or book in your possession?

A. It is an exact copy made by the cashier from the transactions as they occur.

R. X Q. 26. Then there was an entry of these transactions at that time?

A. Yes, sir; I have no doubt he entered the notes as bills receivable.

R. X Q. 27. Have you any objection to showing me the original paper or book of which this is a copy?

A. No, sir.

R. X Q. 28. May I see it to-morrow when I go to the office of the Missouri Pacific?

A. You may see it at my office to-morrow with great pleasure.

R. X Q. 29. Have you any other letters in your possession from Mr. Brown or Mr. Cockrill, or either of them?

A. No, sir; I have no letters from Mr. ——. I have a copy of a letter. I have one letter from Mr. Cockrill in acknowledgment of the receipt, advising me that he had obtained a judgment.

R. X Q. 30. May I see it?

A. Yes (handing letter).

R. X Q. 31. Mr. Sage, had you ever heard of Mr. Cockrill before?

A. No, sir. I wrote a letter to ex-Governor Brown, whom I know well, who is attorney for us at St. Louis, on the twentieth of June, requesting him to select a good and reliable attorney in Little Rock to enforce my claim against the Memphis & Little Rock Railroad Company.

R. X Q. 32. Do you know anything about the letters between Mr. Cockrill and Mr. Brown?

A. I do not.

R. X Q. 33. Have you any other letters in your possession from Mr. Brown?

A. No, sir; I do not think I have. I have a copy of my letter to Mr. Brown asking him to fix his compensation.

R. X Q. 34. I mean have you any letters in your possession from Mr. B. C. Brown, of Little Rock?

A. No, sir; I never saw him.

The witness offers in evidence a copy of letter to Jay Gould, the president of the Missouri Pacific, offering to buy that claim.

It is marked Exhibit D, April 15, 1884—J. A. S., commissioner.

RUSSELL SAGE.

Subscribed and sworn to before me this twenty-first day of April, 1882.

J. A. SHIELDS,
United States Commissioner, Southern District of New York, and Master in Chancery.

Adjourned to Wednesday, April 16, 1884, at 3.30 p. m.

161 NEW YORK *April* 16, 1884.

Met pursuant to adjournment.

Present: Counsel as before.

Examination of A. H. CALEF continued:

The witness produced a stub of the company for $70,000, dated February 28, 1882, which reads, "Central Trust Company, Memphis & Little Rock interest."

The next stub produced read as follows: "May 1, 1882, St. Louis, Iron Mountain & Southern interest, $150,000."

The next stub reads: "May 15, 1882, St. Louis, Iron Mountain & Southern Railroad Company, $25,000. One-eighth commissions on 26,000 Memphis & Little Rock preferred bonds, paid Marquand and Parmley, $32.50 = $25,032.50."

The next reads: "August 4, 1882, H. E. Knox, United States marshal, charge Memphis & Little Rock $80.50."

The next reads: "H. G. Marquand, acc. note, $15,000, and is dated August 4, 1882."

The next is: H. G. Marquand, on note, $10,000," and is dated November 17, 1882.

The next stub reads: "December 7, 1882, H. G. Marquand paid note March 1, 1882, $9,192.06, interest in full on note at 6 per cent., $1,255.49 = $10,447.55.

The witness produced from the ledger of the Missouri Pacific Railway Company the following account:

Memphis and Little Rock Railroad Company.

1882.				1882.			
March	31.	To C, 34 --	70,000 00	April	30.	By C, 36 --	69,378 81
May	29.	To C, 38 --	10,032 50	May	18.	By C, 38 --	446 29
July	31.	To C, 45 --	80 56	May	31.	By J, 18---	10,032 50
Aug.	31.	To C, 46 --	15,000 00	July	31.	By J, 20---	80 56
Nov.	30.	To C, 53 --	10,000 00	July	31.	By J, 20---	175 00
Dec.	30.	To C, 56 --	9,192 06	Aug	31.	By J, 21---	15,000 00
				Nov.	30.	By J, 24---	10,000 00
				Dec.	30.	By J, 25---	9,192 06
			114,305 12				114,305 12

The witness produces, in answer to questions by Messrs. Dillon & Swayne, letter of the Missouri Pacific Railway Company, dated July 18, 1882, addressed to Mr. John W. Goodwin, assistant treasurer, Arkansas, and signed by the witness; and thereupon a copy of the same, which is duly compared, is offered in evidence and marked Exhibit E, April 16, 1884—J. A. S., commissioner.

A. H. CALEF.

162 Subscribed and sworn to before me this twenty-first day of April, 1884.

J. A. SHIELDS,
United States Commissioner, Southern District of New York, and Master in Chancery.

Adjourned to Thursday, April 17, 1884, at 3.30 p. m.

NEW YORK, *April* 17, 1884.

Met pursuant to adjournment.
Present: Counsel as before.

HENRY G. MARQUAND, being duly sworn and examined on behalf of the complainant, testifies as follows:

By Mr. EGLESTON:

Question 1. Mr. Marquand, in the early part of the year 1882 did you pay out any money for coupons of the Memphis and Little Rock Railroad Company, as reorganized?

A. I advanced some money to the Missouri Pacific Railway Company to purchase Memphis and Little Rock coupons.

Q. 2. Will you tell me about the times and the amounts of the payments made for that purpose?

A. They came in very slowly, except one tolerably large amount due to Mr. Moran; I should think covering five or six weeks.

Q. 3. And about how much did you pay out for the payment of those coupons in that term of five or six weeks?

A. It was a little short of $35,000; it was $34,000. I have not been to my office, but we always called it about $35.000; it was a little short of $35,000.

Q. 4. Those payments then were all made, as near as you can recollect, between the first of January and the first of February?

A. I should think it would cover the ground to say the middle of February or the fore part of February. It may have run a little into February, but not much, if any.

Q. 5. To the best of your recollection, it was in the course of January and February?

A. Yes; that is absolute.

Q 6. Now, what did the Missouri Pacific Railway Company give you to secure you for the moneys so advanced?

A. They gave me a note on demand.

Q. 7. For what amount?

A. Added the interest up to the first day of March for a short period, up to the first day of March, and gave me a note dated the first day of March for the account, with a little accrued interest on these payments—a note signed by the president on regular form—a printed form. I don't know whether it was printed or not. It was a regular Missouri Pacific obligation.

Q. 8. Has that note been paid by the Missouri Pacific Railway Company?

A. Yes, sir.

163 Q. 9. When was it paid?

A. It was paid during the summer and fall; I wasn't wanting money, but when I did want $10,000 I would send over. It was paid in three payments; one of $10,000, and one of $15,000, and another of about a little short of $10,000. I was full of money, and I told Calef to let it lie; and he said, "Whenever you want it send over and get the money."

Q. 10. It was not paid earlier because you did not want the money?

A. Yes; I put an advertisement in that I would buy these coupons, but Mr. Cossit sent up to know if the company was paying them, and I said I hadn't anything to do with the company. I was an outsider, and not an officer any more, but I had undertaken for others to purchase them; he would not take his money.

Q. 11. Mr. Marquand, do you know where the note is now?

A. I surrendered it when I got my last payment from the company.

Q. 12. To the Missouri Pacific Railway Company?

A. Mr. Calef, and took his check. I can tell you the day I surrendered it if he will show me his check book.

X Q. by Mr. BOWERS:

X Q. 13. Were you ever an officer of the Memphis and Little Rock, Mr. Marquand?

A. I was.

X Q. 14. When, please?

A. My impression is the fifteenth of February; it was either in

1880 or 1881. I declare I can't tell. I think it was the annual election of 1881, and in January or February.

X Q. 15. What office did you fill?

A. President.

X Q. 16. How long did you hold office?

A. I should think nine months; I really couldn't answer you. It wasn't a great while after that I sold out. I should answer that, as near as I can recollect, from six to nine months.

X Q. 17. Do you remember borrowing any moneys while you were president of that road from any person?

Objected to on the ground that it refers to a time long prior to any of the transactions touched upon.

Answer. I don't recollect. I lent it considerable money that year myself, but as to borrowing from anybody outside I can't recollect.

X Q. 18. Do you remember borrowing any money from Mr. Russell Sage?

A. When; that year?

X Q. 19. Any time when you were president.

A. I guess I did; yes. That is so; I did. Yes, sir; I think it was to pay for some iron, I recollect.

X Q. 20. How much, and when?

A. I did borrow some money from Russell Sage.

X Q. 21. Do you remember the amount?

A. I think twenty-five thousand dollars.

X Q. 22. Was it paid subsequently?

164 A. There was something paid on account, and left a balance of ten thousand dollars, if I recollect rightly—fully ten; it was to purchase a thousand tons of steel rails, I recollect now, which we had to pay cash for. I am glad you spoke, because I couldn't recall whether I had gone to a man to borrow. I had advanced largely myself, and then I went down to Russell Sage, and the amount, I think, was twenty-five thousand dollars.

X Q. 23. Were you interested as a stockholder in that road?

A. When?

X Q. 24. When you were an officer or before.

A. I bought the stock; I think it was in the year 1880; I should think January; about January, 1880, I commenced buying stock.

X Q. 25. Do you remember how much you bought?

A. I bought about thirteen thousand nine hundred and seven and one-half shares.

X Q. 26. That was pretty much the entire capital stock of the road, wasn't it?

A. The capital was a million and a half, of which I believe about thirty thousand, as I understood it, never was issued.

X Q. 27. What did you do with that stock?

Objected to as going altogether outside of the record, and not having anything to — with this matter, and as immaterial, irrelevant, and incompetent, and entirely outside the bounds of proper cross-examination, and counsel for Mr. Sage instructs the witness not to answer. Exception.

ASSOCIATION

Answer. I sold it.

X Q. 28. To whom?

Objected to on the same ground as before.

Answer. I sold it to Mr. Gould for the account of the corporation.

X Q. 29. What corporation?

A. The Iron Mountain.

X Q. 30. When was the sale made?

Same objection.

Answer. It was about from the middle to the last of May.

X Q. 31. At what price did you sell it?

Same objection.

Answer. It would be hard to answer the question.

X Q. 32. Were you the actual owner of the stock at the time you sold it to Mr. Gould for the Iron Mountain?

A. Was I the actual owner of the stock?

X Q. 33. Yes, sir.

A. Every share of it, sir.

X Q. 34. You had bought and paid for it yourself?

A. I had bought and paid for it myself; no one interested in it except myself, directly or indirectly.

X Q. 35. Had you bought it under an agreement to sell the same to the St. Louis and Iron Mountain or to Mr. Gould?

Same objection.

Answer. I had bought it for my own account; I had no connection with Mr. Gould at the time I purchased this stock.

165 X Q. 36. From whom had you bought it?

A. Various parties.

X Q. 37. In acquiring that stock had you also bought a large number of bonds?

A. In regard to the bonds, I never owned any eight per cent. bonds, but was interested in them about eight to nine days, I suppose it was. Parties who had stock wouldn't sell them unless they took the bonds, and I was a holder of bonds not to exceed nine days.

X Q. 38. What arrangements did you make as to the sale of those bonds?

Complainant's counsel objects, and moves to strike out all the answers on this line of cross-examination, and instructs witness not to answer in regard to the sale of that bond and stock, and also in regard to this specific question.

Defendant's counsel objects and excepts.

Under instructions of counsel the witness refuses to answer.

HENRY G. MARQUAND.

Subscribed and sworn to before me this twenty-second day of April, 1884.

JOHN A. SHIELDS,

United States Commissioner and Master in Chancery,

Southern District of New York.

A. H. CALEF, recalled, testified as follows:

By Mr. EGLESTON:

Question 63. Mr. Calef, when you were examined the other day in regard to the account shown by the books of the Missouri Pacific Railway Company of the Memphis and Little Rock it appeared that some payments credited to the Missouri Pacific Railway Company as having been made on account of the Memphis and Little Rock were made after the date of the note. Does that cover all after the date of the note given by the Memphis and Little Rock to the Missouri Pacific Railway Company? You said then that you would look into the matter and see how that was. Have you since done so?

A. Mr. Marquand paid those coupons early in the year, and I gave him that note of the date of March 1.

Q. 64. You gave him a note?

A. Yes.

Q. 65. Of the date of March 1, 1882?

A. I have, and I did not pay him the money until those three checks that I called off yesterday show ten thousand dollars, fifteen thousand dollars, and nine thousand one hundred and ninety-two dollars and something.

Q. 66. Then those credits which appeared in the account which you had the other day of dates later than the date of the note given to the Missouri Pacific Railway Company were payments made on this note of Mr. Marquand, which note was given to him to secure the repayment of moneys which he had advanced for the Missouri Pacific Railway Company in payment of Memphis and Little Rock railway coupons?

A. Yes, sir.

166 Q. 67. Do you know where that note is? I mean the note that was given by the Missouri Pacific Railway Company on March 1 to Mr. Marquand.

A. I think it is in St. Louis. I close out my office here every month and send every voucher there. It is probably there.

Q. 68. Then the note given in June by the Memphis and Little Rock Railway Company to the Missouri Pacific Railway Company was for moneys which had been paid by the Missouri Pacific Railway Company for the Memphis and Little Rock Railroad Company coupons directly and also for the amount which had been advanced by Mr. Marquand?

A. Yes.

Recross by Mr. BOWERS:

R. X Q. 69. Can you produce any resolution of the Missouri Pacific Railway Company under which that note was issued to Mr. Marquand?

A. Can I?

R. X Q. 70. Yes.

A. No resolution.

R. X Q. 71. Do you know the date that the note was issued by

the Memphis and Little Rock Railway Company for $115,000 that was sold by the Missouri Pacific to Mr. Sage?

A. That was June 20, 1882, I think.

R. X Q. 72. Do you know who signed it?

A. No; I do not.

R. X Q. 73. Do you know where it was signed?

A. No.

R. X Q. 74. Have you any personal knowledge of any of these matters you have testified to to-day other than the information you derived from an examination of the books?

A. No.

Defendant's counsel requests a copy of the note for $115,000 purchased by Mr. Sage from the Missouri Pacific.

Complainant's counsel says that he is entirely willing to produce the note or a copy of it, and presumes he can do so.

R. X Q. 75. Do you recollect whether any steps were taken by the Memphis and Little Rock or by their board of directors or otherwise, or any resolution passed under which that note was issued?

A. No; I have no knowledge of anything of that sort.

R. X Q. 76. Do you recollect how it came to be issued?

A. Our note do you refer to?

R. X. Q. 77. No; your note from the Memphis and Little Rock that you sold Sage.

A. No, sir.

R. X Q. 78. But your best recollection of the date is that it was June 20?

A. June 20.

R. X Q. 79. You have seen the note, of course?

A. Yes; think I have, although I don't remember now.

A. H. CALEF.

Subscribed and sworn to before me the twenty-first day of April, 1884.

JOHN A. SHIELDS,
United States Commissioner and Master in Chancery,
Southern District of New York.

167 It is hereby stipulated and agreed that the copies of papers hereto annexed and marked exhibits are correct copies of the papers, and the annexation of the originals is hereby waived.

MELVILLE EGGLESTON,
Of Counsel with Defendants.
PLATT & BOWERS,
Defendant's Attorneys.

EXHIBIT E. April 16, 1884. J. A. Shields, U. S. Commissioner.

(Copy.)

NEW YORK, *Eighteenth July*, 1882.

DEAR SIR: Referring to a letter dated July 13, from R. S. Hayes, Esq., vice-president, in reference to a note given by Mr. Marquand to Mr. Sage, I beg to send you the following statement showing for what the note was given and how it was made up:

1882.			
Jan. 1.	Cash advanced for M. & L. R. coupons due January 1, viz:		
	2,537 coupons, at $40	$101,480 00	
	103 coupons, at $10	1,030 00	
		$102,510 00	
	Interest on $102,510, from January 1 to June 20, say five months and nineteen days, at six per cent	2,887 36	
			$105,397 36
May 1.	Cash advanced for interest of $260 M M. & L. R. preference bonds:		
	Six months' interest on $100 M bonds, at 6 per cent	$3,000 00	
	(Bonds extended—no coupons; payment stamped on bonds).		
	100 coup's of pref. bonds, at $50	5,000 00	
	50 " " " at $40	2,000 00	
		$10,000 00	
	Interest on $10,000 from May 1 to June 20, say one mo. and nineteen days, at six per cent	81 67	
			10,081 67
	Note dated June 20, 1882, for		$115,479 03

Assigned to Russell Sage.

The above coupons have been sent to Mr. C. G. Warner, general auditor, and they are now in his possession.

The general mortgage coupons were cancelled, but the preference coupons were not.

Yours truly,

(Signed) A. H. CALEF, *Treasurer.*

To Mr. John W. Goodwin, assistant treasurer, Little Rock, Ark.

EXHIBIT B. April 15, 1884. J. A. Sh., U. S. Com.

S. R. Cockrill, attorney-at-law.

LITTLE ROCK, ARK., *June* 29, 1882.

Mr. Russell Sage, New York.

DEAR SIR: Your favor of twenty-sixth instant is received covering your check No. 29179 to my order for five hundred dollars on account of my fee in case of yourself *vs.* M. and L. R. R. (as reorganized).

Very truly, S. R. COCKRILL.

168 EXHIBIT D. April 15, 1884. John A. Shields, U. S. Com.

(Copy.)

OFFICE OF RUSSELL SAGE, 71 BROADWAY,
ROOMS 38 AND 39, P. O. BOX 1,468,
NEW YORK, *June* 20, 1882.

Jay Gould, Esq., pres't Mo. Pac. Co., city.

DEAR SIR: I will give you fifty cents on the dollar, payable in ninety days, for your debt and note against the Memphis and Little Rock R. R. Co. (as reorganized), amounting, as I am informed, to the sum of $115,497.03, your company guaranteeing that the said amount is justly due to it from the Memphis and Little Rock R. R. Co.

Yours truly, RUSSELL SAGE.

EXHIBIT C. April 15, 1884. J. A. S., U. S. Com.

(Copy.)

OFFICE OF RUSSELL SAGE, 71 BROADWAY,
ROOMS 38 AND 39, P. O. BOX 1,468,
NEW YORK, *June* 26, 1882.

Sterling R. Cockrill, Jr., Esq., attorney-at-law, Little Rock, Ark.

DEAR SIR: Enclosed herewith please find my check, No. 29179, for $500, payable to your order, on account of your compensation, as arranged, for professional services in the collection of my claim in your hands against the Memphis and Little Rock Railroad Company (as reorganized).

Please send me your receipt for the same, and oblige,

Yours truly, RUSSELL SAGE.

EXHIBIT A. April 15, 1884. J. A. S., U. S. Com.

MISSOURI PACIFIC R. R. COMPANY,
NEW YORK, *June* 20, 1882.

The executive committee of the Missouri Pacific Railway Co. met this day at No. 195 Broadway.

Present: Jay Gould, Russell Sage, Sidney Dillon, Thomas T. Eckert, and Samuel Sloan.

The minutes of last meeting were read and approved.

The president read the following communication:

"NEW YORK, *June* 20, 1882.

"Jay Gould, Esq., president Mo. Pac. Co., city.

"DEAR SIR: I will give you fifty cents on the dollar, payable in ninety days, for your debt and note against the Memphis and Little Rock R. R. Co. (as reorganized), amounting, as I am informed, to the sum of $115,479.03, your company guaranteeing that the said amount is justly due to it from the Memphis and Little Rock R. R. Co.

"Yours truly,
(Signed) "RUSSELL SAGE."

The following was then presented:

Whereas the president of this company has received the above offer from Mr. Russell Sage:

Therefore, on motion of Mr. Dillon, seconded by Mr. Eckert, be it

Resolved, That said offer be, and the same is hereby, accepted, and that the debt of this company, as well as the note of the Memphis and Little Rock Railroad Company (as reorganized) evidencing the same, be, and the same are hereby, transferred and assigned to the said Sage, and that the president be, and he is hereby, authorized to execute any further assignment of said debt that counsel may advise, and also to endorse and deliver said note to the said Sage.

The committee, on motion, adjourned.

169 United States Circuit Court, Eastern District of Arkansas.

RUSSELL SAGE and Others, Complainants,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, John A. Shields, a commissioner and master of chancery, duly appointed by the circuit court of the United States for the southern district of New York, do hereby certify that I have been attended by Melville Egleston, Esq., counsel for the plaintiffs, and by John M. Bower, Esq., counsel for the defendants, and by Russell Sage, A. H. Calef, and Henry G. Marquand, the witnesses named in the foregoing depositions, on the days therein indicated; that the witnesses were by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, and thereupon gave their testimony, which, upon consent of the counsel for the respective parties, was taken by a stenographer appointed by me for that purpose; that after the stenographic notes of the testimony of the witnesses had been reduced to writing the same was read over by the respective witnesses, and they severally subscribed and swore to the same in my presence.

I further certify that the said depositions were taken under and pursuant to a commission, which is hereunto annexed.

I further certify that due notification of the time and place of taking the said depositions was made out and served on the attorneys for the defendants to be present at the taking of the depositions, and to put interrogatories if they thought fit, said notice being hereunto annexed.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said depositions and commission named, nor in any way interested in the event of the cause named in said commission.

In testimony whereof I have hereunto set my hand and seal this twenty-third day of April, in the year of our Lord one thousand eight hundred and eighty-four, and the Independence of the United States the one hundred and eighth.

[SEAL.] JOHN A. SHIELDS,
United States Commissioner and Master in Chancery, Duly Appointed by the Circuit Court of the United States for the Southern District of New York, in Second Circuit.

Filing.

Opened, published, and filed in master's office April 26, 1884.
CHARLES P. REDMOND, *Master.*

EXHIBIT X.

Agreement for Depositions.

United States Circuit Court. In Chancery.

RUSSELL SAGE

versus

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized).

We agree that depositions may be taken in this case on behalf of the intervenors at the office of Chas. D. Greene, Jr., in the city of St. Louis, State of Missouri, before any officer—State or Federal—authorized by law to take depositions, without any commission or rule of court, between the hours of 9 a. m. and 4 p. m., on the 28th day of April, 1884, to be continued, if need be, at the same place and between the same hours, from day to day, until the depositions are completed, the opposite party being allowed to take depositions at the same place and time.

This 23d day of April, 1884.

S. R. COCKRILL,
For Plaintiff.
B. C. BROWN,
For Defendant, The M. & L. R. R. Co. (as Reorganized).
U. M. & G. B. ROSE,
For Intervenors.

170 EXHIBIT A.

When making settlement in favor of this company please refer to bill No. 10862.

Address: Little Rock, Ark.

Memphis and Little Rock railway to the Texas and Pacific Railway Co., Dr.

1882. For amount paid Sterling R. Cockrill, Esq., for legal services $400 00

Account; pay November, 1882; voucher 1170; credit miscellaneous accounts.

S. PHILLIPS,
C. G. WARNER.

I hereby certify the above to be correct.

C. G. WARNER, *Auditor.*

Approved.

H. M. HOXIE,
General Manager,
By PHILLIPS.

Received, St. Louis, ——, 188—, of —— dollars, in full of above account.

——.

EXHIBIT B.

Accounts Payable.

Address: Little Rock, Ark.

Texas and Pacific Railway Company to Sterling R. Cockrill, Esq., Dr.

1882, November 22. For legal services to be charged to suspended account against the Memphis and Little Rock Railway Company $400 00

Authorized, examined, and found correct.

Examined and approved.

(Signed) JOHN C. BROWN,
General Solicitor —— Division.

Approved.

(Signed) R. S. HAYES,
Vice-President.

UNITED STATES OF AMERICA,
The State of Missouri, the City of St. Louis, } ss:

In the Circuit Court of the United States for the Eastern District of Arkansas.

The President of the United States to S. Phillips and C. G. Warner, Greeting:

You are hereby commanded that, setting aside all manner of excuse and delay, you be and appear before the undersigned notary public within and for the city of St. Louis, in the State of Missouri, on the twenty-eighth day of April, A. D. 1884, at the hour of two o'clock p. m. of said day, at his office, No. 18 North Third street,

(second floor), in the city of St. Louis and State of Missouri, then and there to testify and the truth to say in a certain cause now pending in the circuit court of the United States for the eastern district of Arkansas, wherein Russell Sage is plaintiff and The Memphis and Little Rock Railroad Company, as reorganized, is defendant, on the part of the interveners.

Hereof fail not at your peril.

Witness Charles D. Greene, Jr., notary public within and for said city of St. Louis and State of Missouri, with official seal hereto affixed, on this twenty-sixth day of April, A. D., 1884.

[SEAL.] CHAS. D. GREENE, JR.,
Notary Public.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Joseph Pasquier, being duly sworn, on his oath says: I served the within subpœna in the city of St. Louis and State of Missouri on the twenty-eighth day of April, A. D. 1884, by reading the same to the within-named Samuel Phillips and Charles G. Warner in person.

J. PASQUIER.

Sworn to and subscribed to before me this twenty-eighth day of April, A. D. 1884.

Witness my hand and official seal.

[SEAL.] C. D. GREENE, JR.,
Notary Public.

171 In the Circuit Court of the United States for the Eastern District of Arkansas.

RUSSELL SAGE, Plaintiff,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant.

The deposition of Charles G. Warner, taken between the hours of 9 o'clock a. m. and 4 o'clock p. m., on the twenty-eighth day of April, A. D. 1884, at the office of Charles D. Greene, Jr., No. 18 North Third street, in the city of St. Louis and State of Missouri, to be read as evidence in an action between Russell Sage, plaintiff, and the Memphis and Little Railroad Company, as reorganized, defendant, now pending in the circuit court of the United States for the eastern district of Arkansas, on the part of the interveners.

The said CHARLES G. WARNER, being by me first duly cautioned, sworn, and examined on the part of the interveners, deposes and says as follows, to wit:

Direct examination by C. P. ELLERBE, Esq., for the interveners:

First Question. What is your name, Mr. Warner?
Answer. My name is Charles G. Warner.

Second Question. Where do you reside?

Answer. St. Louis, Missouri.

Third Question. What is your connection, if any, with the Missouri Pacific or Texas and Pacific Railway Companies?

Answer. I am the general auditor of the Missouri Pacific Railway, its leased and operated lines.

Fourth Question. Under that is included the Texas and Pacific Railway Company, is it not?

Answer. Yes, sir.

Fifth Question. (Handing the witness a paper.) Please look at this bill, No. 10862, and state what it is.

Answer. That is a bill made from a voucher.

Sixth Question. The bill is made from voucher 1170, is it not?

Answer. Yes, sir.

Seventh Question. (Handing witness another paper.) Please examine this and say what it is.

Answer. That is a copy of a voucher in favor of Sterling R. Cockrill for legal services.

Eighth Question. That voucher is made out to the Texas and Pacific Railway Company from Cockrill, is it?

— Yes, sir.

Ninth Question. The original of that voucher is in your possession, is it?

Answer. Yes, sir.

Tenth Question. Is that a copy?

Answer. Yes, sir.

Eleventh Question. That money, I presume, was paid on that voucher?

Answer. Yes, sir; it was paid to Mr. Cockrill.

Mr. ELLERBE: I offer in evidence the bill and copy of the voucher, marked, respectively, "A" and "B."

The said papers are hereto attached, marked as stated.

Cross-examination by Hon. JOHN C. BROWN, for the defendant:

First X question. Look at the exhibits filed in answer to your examination-in-chief and say how the amount of four hundred dollars was to be charged?

Answer. It was to be charged to a suspense account.

Second X question. Between what and what?

Answer. The understanding was that it was a suspense account against Russell Sage.

Third X question. Then do I understand you to say that that account in Exhibit "B" was to be a suspense account between the Texas and Pacific or the Missouri Pacific Railway Company, as the case may be, and the Memphis and Little Rock Railroad Company?

— Yes, sir; the Memphis and Little Rock Railroad Company, as used here, was simply, as I understand it, a designation to distinguish the account as one foreign to our system, but really it should have read "Russell Sage."

Fourth X question. When was it intended that the Memphis and Little Rock Railroad Company should pay anything, or was it intended that it should pay anything at all?

Answer. The matter was never decided to my knowledge; it was an indefinite account.

172 Fifth X question. Was it conditioned at all upon the result of a litigation that was pending between Russell Sage and the Memphis and Little Rock Railroad Company, or how was the account made out, in contingency of a litigation between Sage and the Memphis and Little Rock Railroad Company?

Answer. My understanding was that this was an account to be held until the litigation was closed.

Sixth X question. And then how was the amount of four hundred dollars to be charged or accounted for?

Answer. That was a matter to be determined. I am not familiar with it.

Seventh X question. In rendering the account contained in Exhibit "A" did you follow the instructions given in Exhibit "B," by stating that it was a suspended account?

Answer. No, sir.

Eighth X question. It should have been, then, as stated in Exhibit "A," a suspended account?

Answer. Yes, sir; the bill should not have been presented, but should have been held as a suspended account.

Ninth X question. Until the termination of that litigation?

—. Yes, sir; or until further orders.

Tenth X question. Have you anything else to say in regard to this bill?

Answer. The bill, of which Exhibit "A" is a copy, was paid by the Memphis and Little Rock Railroad Company to the Missouri Pacific Railway Company, but it is a charge now against the claim that Russell Sage has against the Memphis and Little Rock Railroad Company. These blanks with the Texas and Pacific heading were used instead of blanks bearing the Missouri Pacific heading, the Missouri Pacific Railway Company being the company that settled the accounts both ways. It has no bearing whatever with the Texas and Pacific Railway Company accounts. These headings were occasionally used interchangeably, through carelessness, I presume.

Eleventh X question. Do you know anything else about this matter, Mr. Warner, of your own knowledge?

Answer. No, sir.

C. G. WARNER.

Sworn to and subscribed before me this twenty-eighth day of April, 1884.

Witness my hand and official seal.

C. D. GREENE,
Notary Public.

The interveners, by their counsel, Mr. Ellerbe, announcing that they would take no further testimony under this agreement, the de-

fendant, The Memphis and Little Rock Railroad Company, produced Hon. John C. Brown as a witness on its behalf under the conditions of said agreement.

The said JOHN C. BROWN, being by me first duly cautioned, sworn and examined on the part of the defendant, deposes and says as follows, to wit:

In the summer of 1882, and between the middle and the last of June, say about the twentieth of June of that year, Russell Sage, of New York, who had advanced money, as I understood, to the Memphis and Little Rock Railroad Company in the shape of a loan to pay the coupons maturing in January of that year, requested me to secure for him an attorney in Little Rock to take charge of the claim and collect it. At that time I had no direct connection with the Memphis and Little Rock railroad, the terms of my retainer with the Gould system not having included that line. I secured the services of Sterling R. Cockrill and contracted with him for a specific fee, to be paid in certain amounts and at certain times. The first installment of his fee, as I now remember, was sent direct from New York; the second was four hundred dollars, and I was called upon by Mr. Cockrill. At Mr. Sage'e request I paid it through the voucher mentioned by the general auditor, Mr. Warner, a copy of which is marked Exhibit "B" and filed with the deposition of the general auditor, Mr. Charles G. Warner, which was approved by myself and also by R. S. Hayes, who was vice-president of the Missouri Pacific system, and the four hundred dollars were paid to Mr. Cockrill on account. I directed in the voucher that it be charged to supended account against the Memphis and Little Rock Railroad Company, it being understood at the time that when the litigation of Mr.
173 Sage against the Memphis and Little Rock Railroad Company should be concluded, if he recovered, the amount paid on this account should be deducted from his recovery against the railroad company. If he did not succeed in his litigation, it was an offset at all events to his claim against the railroad company.

That the railroad company was indebted to Mr. Sage in the amount stated was undisputed by the company or any one representing it. On the contrary, all admitted that it was just and should be paid. But the company at the time was in a very embarrassed condition financially, and its earnings were not sufficient to pay the fixed charges and the floating indebtedness and at the same time maintain the property, and Mr. Sage was frankly informed of that fact.

The company, under advice of counsel at New York, confessed judgment and a receiver was appointed under the application made in Little Rock to the chancellor of Pulaski county. The account contained in Exhibit "A" should not have been presented to the Memphis & Little Rock Railroad Company, nor was it intended that it should have been; and, having been paid, it is a charge on the Sage claim.

JNO. C. BROWN.

Sworn to and subscribed before me this twenty-eighth day of April, A. D. 1884.

Witness my hand and official seal.

C. D. GREENE, JR.,
Notary Public.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

I, Charles D. Greene, Jr., a qualified notary public in and for said city, do hereby certify that the foregoing depositions of Charles G. Warner and John C. Brown were taken before me and were read to and subscribed by them in my presence at the time and place and in the action mentioned in the caption, the said witnesses, Charles G. Warner and John C. Brown, having been first sworn by me that the evidence they should give in the action should be the truth, the whole truth and nothing but the truth, and their statements were reduced to writing by me in their presence, the plaintiff not being present either in person or by counsel, the defendant being present by Hon. John C. Brown, as counsel, and the interveners being present by Hon. C. P. Ellerbe at the said examination.

In witness whereof I have hereto set my hand and official seal this twenty-eighth day of April, A. D. 1884.

C. D. GREENE, JR.,
Notary Public.

Opened, published, and filed in master's office May 2, 1884.
CHAS. P. REDMOND, *Master.*

EXHIBIT Y.

The Testimony of U. M. Rose, Taken by Consent.

In the Circuit Court of the United States, Eastern District of Arkansas.

RUSSELL SAGE, Complainant,

versus

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized, Defendant.

Before the Honorable Charles P. Redmond, master.

Examined by Judge BROWN:

Question. Were you not employed as counsel by the trustees of the mortgage of May 2, 1877, executed by the Memphis and Little Rock Railroad Company before the commencement of this suit?

Answer. I was.

Question. Were not your clients willing that the receivership in this case should be continued?

Answer. I have no definite recollection of any communication with them on that subject, but, as for myself, pending this and several other suits relating to the same property some time after the receiver had been appointed I came to the conclusion that it was to the in-

terest of the trustees that the receiver should be continued in possession pending the litigation, as we would thereby be placed
174 in a situation to examine the accounts relating to the management and operation of the road with more facility than if the property was in the hands of the company.

Question. When the case was set for hearing before Judge McCrary at Keokuk, June 17, 1883, did you appear there either in person or by brief and endeavor to bring an end to the receivership?

Answer. I was not there personally nor by brief, as far as I remember.

Question. I ask the same question as to the time when it was set to be heard by Judge McCrary, on the first day of November, 1883, at Kansas City, Mo.

Answer. I have no recollection of that occasion; I was not there and filed no brief, so far as I remember.

Witness is shown a paper.

Question. Look at that paper shown you and say if it is not a copy of a paper which you executed on behalf of the trustees, Dow, Matthews, and Moran, and make it an exhibit.

Answer. I did execute that paper: my object was to get off for a summer vacation; I wanted a truce.

U. M. ROSE.

In all matters affecting the Memphis and Little Rock railroad and the litigation pending between the holders of the bonds issued by that company and the company it is hereby agreed as follows:

I. In the case of the Equitable Life Association and others against the Memphis and Little Rock Railroad Company the defendants, R. K. Dow, Watson Matthews, and Charles Moran, may, if they desire, enter their demurrer to the bill and amended bill, which demurrer shall, with all the papers hereinafter mentioned, be referred to the Honorable George W. McCrary without argument, and be by him considered in the application made in said bill and amended bill for a receiver.

II. All papers in the last-named case, together with the papers in the case of Russell Sage *versus* The Memphis and Little Rock Railroad Company shall be referred to and heard by the Honorable George W. McCrary, each party having the right to submit any briefs they may desire, whether such party be a party to the record or not; but whatever order may be made by Judge McCrary affecting the present status of the condition of affairs, such order shall not be entered nor have effect till the first Monday in October next, up to which time it is agreed that the receivership now existing of the assets of the Memphis and Little Rock Railroad Company may continue undisturbed, and that the present status of affairs shall continue without disturbance of any kind by either party until the time named.

III. Should R. K. Dow and Watson Matthews, as trustees of the preference mortgage executed by the Memphis and Little Rock Rail-

road Company on the first day of May, 1877, desire to file an independent bill for the foreclosure of said mortgage their counsel may prepare the same at his leisure, furnishing a copy thereof to B. C. Brown, counsel for the Memphis and Little Rock Railroad Company, by the first day of September next, and thereupon the Memphis and Little Rock Railroad Company hereby agrees that it will enter its appearance and plead, answer, or demur to such bill by the second Monday in October next.

June 26, 1883.

(Signed) U. M. AND G. B. ROSE,
For Dow, Matthews, and Moran.

(Signed) B. C. BROWN,
For the M. & L. R. R. Co. (as Reorganized).

(Signed) J. M. ROSE,
For Eq. L. Ass'n et al.

(Signed) S. R. COCKRILL,
For Russell Sage.

Filing.

Filed in master's office April 25, 1884.
CHARLES P. REDMOND, *Master.*

175 EXHIBIT Z.

In United States Circuit Court for the Eastern District of Arkansas.

RUSSELL SAGE

versus

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized).

Before Honorable Charles P. Redmond, master.

In obedience to the order of the court made April 4, 1884, requiring all parties making claims to the fund now in the hands of the receiver to file such claim before the master the defendant company respectfully makes its claim and demands—

1. That the whole sum in the hands of the master be paid to the defendant company.

2. Should it be held by the master that the plaintiff, Russell Sage, is entitled to have his claim or demand against this defendant paid, then defendant claims and demands that all the rest and residue of the fund be paid to it.

Dated at Little Rock, Arkansas, this eighth day of April, 1884.

THE MEMPHIS AND LITTLE ROCK
RAILROAD COMPANY (AS REORGANIZED),
By B. C. BROWN, *Counsel.*

Filing.

Filed in master's office April 8, 1884.

CHAS. P. REDMOND.

EXHIBIT Z[F].

RUSSELL SAGE
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized). } No. 512.

Received from Ralph L. Goodrich, clerk United States circuit court for the eastern district of Arkansas, the sum of one thousand dollars (1,000) on account of services as solicitor in the above-entitled cause.

April 22, 1884.

B. C. BROWN.

EXHIBIT Z[G].

RUSSELL SAGE
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized). } No. 512.

Received from Ralph L. Goodrich, clerk United States circuit court for the eastern district of Arkansas, the sum of four thousand one hundred and sixteen dollars and sixty-nine cents (4,116.69) on account of services as receiver in the above-entitled cause.

April 22, 1884.

E. K. SIBLEY, *Receiver.*

EXHIBIT Z[H].

Notice of Reading Report.

Circuit Court of the United States, Eastern District of Arkansas, in Chancery Sitting.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant. } No. 512.

MASTER'S OFFICE, *May* 3, 1884.

To the complainant, defendant, and interveners in above cause:

You and each of you are hereby notified that the report of
176 the master in the above cause will be prepared, and you will appear in the master's office to hear the reading of the same on the twelfth day of May, 1884, at ten o'clock a. m., and then and there make your objections and take your exceptions thereto, if any you have.

CHARLES P. REDMOND, *Master.*

We acknowledge service of the above notice this third day of May, 1884.

S. R. COCKRILL,
For Plaintiff.
B. C. BROWN,
For Defendant.
U. M. & G. B. ROSE.

EXHIBIT Z^K.

Memphis & Little Rock Railroad Co. (as reorganized) to D. S. H. Smith, local treas. Mo. Pacific R'y, Dr.

ST. LOUIS, Mo., *M'ch* 6, 1884.

For the month of March.

1884.
M'ch 6. To partial payment to Russell Sage on account of money advanced to pay interest and other accounts during the months of April, May, July, and December, 1882, as per statement attached to duplicate voucher in auditor's office—this payment to be placed to the credit of the Sage judgment ---------- $7,036 05

Original.
Correct.

C. H. DOLBEAR, *Aud'r.*

Approved for payment.

R. S. HAYES, *Pres'd't.*

Received seven thousand and thirty-six and $\frac{5}{100}$ dollars in full of the above account.
M'ch 6, 1884.

D. S. H. SMITH, *Lo. Tr.*

Filing.

Filed in master's office May 2, 1884.
CHAS. P. REDMOND, *Master.*

EXHIBIT Z^L.

Memphis & Little Rock Railroad Co. (as reorganized) to D. S. H. Smith, local treas. Mo. Pa. R'w'y Co., Dr.

ST. LOUIS, *March* 8, 1884.

For the month of March.

1884. For partial payment to Russell Sage on account of money advanced to pay interest on other accounts during the months of April, May, July, and December, 1882, as per statement attached to duplicate voucher No. 3 in auditor's office—this payment to be placed to the credit of the Sage judgment ---------- $9,000 00

Original.
Charge to bills payable.
Correct.

C. H. DOLBEAR, *Aud.*

$9,000.

Approved for payment.

R. S. HAYES, *President.*

Received nine thousand dollars in full of the above account.
M'ch 10, 1884.

D. S. H. SMITH,
Local Treas.,
Per POLLOCK.

Filing.

Filed in master's office May 2, 1884.
CHAS. P. REDMOND, *Master.*

177 EXHIBIT Z^N.

Memphis & Little Rock R. R., Dr., to the Missouri Pacific Railway Co. for unsettled bills, as under.

Bill No.	Date.	Nature.	Amount.
	1882.		
9747	Sep.	Copies of papers	$33 60
10330	Nov.	Expenses, J. C. Brown	65 00
10737	"	Attorneys' services	1,050 00
10836	Dec.	Expenses, B. C. Brown	300 00
10862	Nov.	Services, S. R. Cockrill	400 00
11168	Dec.	Printing	101 20
11227	"	Do.	51 00
	1883.		
12322	M'ch.	Expenses, B. C. Brown	40 00
12685	Ap'l.	Services, "	3,000 00
13407	May.	Printing briefs	19 55
13549	June.	Services, B. C. Brown	250 00
13552	"	Printing briefs	201 00
13559	"	Services, B. C. Brown	275 00
14537	Aug.	Legal expenses	267 75
14658	Sep.	Cost of transcript record	177 10
14983	"	Expenses, E. K. Sibley	75 00
15269	Nov.	Legal services	1,130 50
15427	"	Expenses, J. M. Rose	17 00
15592	"	Commissioner's services, *re* Dow	25 00
15729	"	Printing briefs	29 90
15958	Dec.	" " *re* Sage	20 70
15984	"	" proofs, &c., *re* Dow	99 60

	1884.		
16441	Jan.	Depositions & printing	63 05
16610	"	Supplies	18 90
16705	M'ch.	Rent of depot, &c.	216 65
16749	Feb.	Legal printing	36 45
		Total	$7,993 95
	1882.		
	Ap'l.	Services, B. C. Brown	3,000 00
			$10,963 95

Memphis & Little Rock Railroad Co. (as reorganized) to D. S H. Smith, local treas. Mo. Pac. R'y., Dr.

ST. LOUIS, Mo., *M'ch* 6, 1884.

For the month of March.

1884.
M'ch 6. To amount due Missouri Pacific R'y on account of miscellaneous bills paid for account M. & L. R. R., as per statement and bills filed with duplicate voucher in auditor's office $10,963 95

Duplicate.
Approved for payment.

R. S. HAYES, *Pres'd't.*

Received ten thousand nine hundred & sixty-three & $\frac{95}{100}$ dollars in full of the above account.
M'ch 6, 1884.

D. S. H. SMITH, *Lo. Tr.*

Filing.

Filed in master's office April 22, 1884.
CHAS. P. REDMOND, *Master.*

178 EXHIBIT ZN.

ARKANSAS UNION PRINTING COMPANY,
LITTLE ROCK, *June* 20, 1883.

Gov. J. C. Brown, cor. 6 & Locust St., St. Louis, Mo.

DEAR SIR: We enclose you bills approved by B. C. Brown, att'y, of this place, for Memphis & L. R. R. Co. (as reorganized)---- 7
" " " " " " " ---- 125
201

Amounting to two hundred and one dollars.
Yours, ARK. UNION PRT. CO.

PRINTERS AND BLANK BOOK MAKERS,
LITTLE ROCK, *June* 14, 1883.

Memphis & Little Rock R. R. Co. (as reorganized) to Arkansas Union Printing Co., Dr., cor. Markham and Scott streets.

To 50 briefs, Sage *v.* M. L. R. R. (as reorganized), 64 pp., a 1.00 p. p. ---------- 64 00
" 50 briefs, Sage *v.* M. L. R. R. (as reorganized), 12 pp., a 1.00 p. p. (Cockrill) ---------- 12 00
——— $76 00

Rec'd payment,
ARK'S UNION,
By A. WASSELL.

June 15, 1883.—I certify that the above account is correct and due.

B. C. BROWN,
Gen. Counsel.

PRINTERS AND BLANK BOOK MAKERS,
LITTLE ROCK, *June* 14, 1883.

Memphis & Little Rock R. R. Co. (as reorganized) to Arkansas Union Printing Co., Dr., cor. Markham and Scott streets.

To printing deeds, by-laws, and other documents as per contract ---------- 125 00

Rec'd payment,
ARK'S UNION,
By A. WASSELL.

June 15, 1883.—I certify that the above account is correct and due.

B. C. BROWN,
Gen. Counsel.

When making settlement or voucher in favor of this company please refer to bill No. 13552.

Memphis and L. R. R. R. to the Missouri Pacific Railway Co., Dr.; address, Little Rock, Ark.

1883. For amount paid Arkansas Union Printing Co. for printing briefs in case of Sage *vs.* Memphis and L. Rock R. R. June, 1883 -- 76 00
Printing deeds, by-laws, and other documents as per contract ---------- 125 00
——— $201 00

(Receipted bills attached.)
Register No. 129. Acc'ts payable June, 1883. Vo. No. 1080.
Credit mis'l's ac's
Examined and audited.

C. G. W.,
General Auditor.

Approved.

A. A. SALMAG,
Gen'l Transp. Manager,
HAYS.

Filing.

Filed in master's office April 22, 1884.
CHAS. P. REDMOND, *Master.*

179 EXHIBIT Zo.

Memphis and Little Rock R. R. to the Missouri Pacific Railway Co., Dr., St. Louis, Iron Mountain & Southern Division; address, Little Rock, Ark.

1883. For amount paid J. M. Rose, Little Rock., Ark., for legal services for plaintiff in the case of Equitable Life Ass'n of America *v.* Memphis and Little Rock R. R. ---------- $250 00

(June, 1883.)
Register No. 126. Acc'ts payable June, 1883. Vo. No. 899.
Credit Mis'l's ac'ts.

I hereby certify the above to be correct.
C. G. WARNER, *Aud'r.*

Approved.

A. A. SALMAG,
General Manager,
HAYS.

EXHIBIT Zp.

Memphis & Little Rock R. R. to the Missouri Pacific Railway Co., Dr.; address, Little Rock, Ark.

188–. For traveling expenses of J. M. Rose from Little Rock to Kansas City & return in Nov'r, 1883, while attending Judge McCrary, for the purpose of continuing the receivership in the case of Russell Sage *vs.* Memphis & Little Rock R. R. Co. (as reorganized) ---------- $17 00

Register No. 161. Acc'ts payable Nov., 1883. Vou. 401.
Credit mis'l's ac's.
Examined and audited.
C. G. WARNER,
General Auditor.

Approved.
JNO. C. BROWN, *Gen. Sol.*

EXHIBIT ZR.

When making settlement or voucher in favor of this company please refer to bill No. 15269, sheet 1.

E. K. Sibley, receiver M. and L. R. R. R., to the Missouri Pacific Railway Co., Dr., St. L., I. M. and S. Div.; address, Little Rock, Ark.

For amounts expended ac. legal services, &c., for ac. of M. and L. R., as follows:

1883.

Nov'r 23.	Paid C. G. Burgoyne—		
	In case of M. & L. R. *vs.* R. K. Dow *et. al.:*		
	50 copies analysis of bill, 5 pp. at 90c.	4 50	
	Alterations & 5 galley proofs, 3 h'rs at 50c.	1 50	
	100 copies bill of complaint & exhibits, 190 pp. at $2.30 (night work)	437 00	
	Cover	1 50	
	First 40 pp., reprinted ac. changes, at 75c	30 00	
	Alterations & extra proofs, 72 h'rs at 50c.	36 00	
			510 50
	Paid Geo. C. Holmes, deputy U. S. marshal—		
	Same case, for extra services & disbursements in serving writs of subpœna on the defend'ts at the request of Dillon & Swayne, solicitors	-----	40 00
	Paid C. G. Burgoyne—		
	50 copies of answer, 16 pp. at 90c.	14 40	
	Cover	1 50	
	Alterations, 6 h'rs at 50c.	3 00	
	50 copies of argument, 32 pp., viz:		
	25½ pp. at 95c.	24 20	
	6½ pp. solid, at $1.00	7 15	
	Cover	1 50	
	Alterations, 36 h'rs at 50c., and ½ p. canceled	18 40	
			70 15
180 Nov'r 23.	Paid C. G. Burgoyne—		
	In case Equitable Life Assurance Society *et al. vs.* M. and L. R. R. R.:		
	50 copies of brief, 11 pp. at 95c.	10 45	
	30 copies of original and amended bill, 26 pp. at 80c.	20 80	
	Cover	1 50	

Alterations—3 h'rs at 50c.	1 50	
In the case of M. and L. R. R. R. *vs.* R. K. Dow *et al.:*		
50 copies of complaint, 21 pp. at $1.70 (night work)	35 70	
Cover	1 50	
Alterations—4 hours at 50c.	2 00	
		73 45
Forwarded		$694 10

Sheet 2.

Am't brought forward		694 10
Paid Jno. A. Shields—		
For taking testimony in case of M. and L. R. R. R. *vs.* R. K. Dow *et al.*:		
In long hand, 26 fol. at 20c.	5 20	
By stenographer, 26 fol. at 30c.	7 80	
Two copies of testimony of Sims & Borg, one delivered to def't & one to complainant, 32 folios each, 64 — at 10c.	6 40	
Attendance fee, May 19, 22, 23, & June 7, at $3.00	12 00	
Attendance fee, self & stenographer, May 25	5 00	
		36 40
Paid Jas. H. McKinney, clerk Supreme Court U. S., being deposited for costs in case of M. & L. R. R. R. *vs.* R. K. Dow *et al.*		400 00
		$1,130 50

Month of Nov., '83.
Register No. 67.
Credit mis'l's ac's.
Examined and audited.

C. G. WARNER,
General Auditor.

Approved:
JNO. C. BROWN, *Gen'l Sol.*

EXHIBIT Zs.

Circuit Court of the United States, Eastern District of Arkansas.

RUSSELL SAGE, Complainant,

versus

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant.

Before the Hon. Charles P. Redmond, master, upon reference.

To the Hon. Chas. P. Redmond, master:

The defendant respectfully asks that you will find the following, as being proven as facts in this cause:

1. That no part of the income or receipts of the property during the time of the receivership in this cause was paid to or received by either the president or directors of the defendant or to any stockholder of the defendant, and that neither the company, its president, nor any director or stockholder in any manner received any pecuniary benefit from the receivership.

2. That the railroad of the defendant was largely improved during the receivership by improvements made thereon by the receiver and by the application of the income of the property.

181 3. That no part of the moneys received by the receiver from the operation of the said road or in any manner from the income of the property was diverted or attempted to be diverted from the improvement of the property or the payment of defendant's debts.

4. That no officer or stockholder of the defendant in any manner attempted to influence the receiver to do anything to the injury of any creditor of the property.

5. That the receiver was honest, competent, and faithful.

6. That the debt or debts for which the defendant confessed judgment on the twenty-fourth day of June, 1882, in favor of Russell Sage, whether owned in whole or in part by said Sage or by the Missouri Pacific Railway Company, was just and due.

7. That R. K. Dow was one of the trustees of both the preference and general mortgages executed by the defendant company, and that he was and is the managing trustee and the one who has or seems to have the chief direction of all the litigation brought by or on behalf of said trustees or of the holders of the bonds secured by the general mortgage.

8. That the interveners in this case are holders of bonds and coupons secured by the general mortgage executed by this defendant, and that the same counsel represents them in their suits at law upon said coupons and in their bill to enforce the payment of their judgments as is employed by and represents the trustees in all proceedings taken by them.

9. That before the failure of the defendant to pay any installment of interest maturing upon the general mortgage the said R. K. Dow stated and threatened that in case any default in the payment of

such interest occurred the bondholders would not take steps to foreclose the mortgage, but would bring as many separate suits at law in the United States circuit court as could be separately brought upon coupons taken from the bonds secured by these mortgages every six months, and would seize the rolling stock and other personal property of the company under execution.

10. That after the institution of the receivership and the failure of the company to pay interest twenty-three separate suits at law, all based upon coupons taken from the bonds secured by the general mortgage, were brought to one term of the United States circuit court, not one of which amounted to five thousand dollars.

11. That at the first meeting of the stockholders held after the receivership the defendant, in order to provide for suits being prosecuted against it, there being no person in the State upon whom service could be made, passed a resolution authorizing its attorney and counsel, B. C. Brown, to enter the appearance of the company to all suits brought against it.

12. That immediately thereafter the said defendant, through its said attorney and counsel, entered its appearance to all the twenty-three suits which had theretofore been brought against it, as stated in the clause above, at the April term, 1883. Judgments were rendered in favor of the plaintiffs in all of said causes, which judgments were rendered on such appearances.

13. That shortly thereafter each judgment creditor who had so obtained judgment filed his separate bill to enforce such judgment, all of said bills, except as to dates and amounts, being copies of each other; that the defendant entered its appearance to all of said actions, and that said suits were thereafter, upon motion of the defendant, consolidated by the court.

14. That fifteen other suits, based upon coupons taken from the same mortgage bonds, were afterwards brought to the October term of this court; that the defendant entered its appearance to all of them, and that the plaintiffs in all said cases recovered judgments upon such entry.

15. That four other suits at law were also brought on preference mortgage bonds and coupons taken therefrom and belonging thereto by different holders; that defendant entered its appearance thereto, and that plaintiffs recovered judgments upon such appearance at the October term, 1883.

182 16. That on the twenty-sixth day of June, 1883, a bill was filed by the trustees of the preference mortgage for the foreclosure of that mortgage, and that defendant entered its appearance thereto, and that upon the seventh day of April, 1884, a decree final therein was rendered.

17. That upon the twelfth day of February, 1884, a bill was filed by the trustees of the general mortgage praying the appointment of a receiver, or the delivery to them of possession of the property conveyed by that mortgage, and that to said suit defendant entered its appearance.

18. That it also entered its appearance to all actions brought against it.

19. That the trustees of both mortgages and the holders of the bonds and coupons thereby secured were willing that the receivership should be prolonged and the property kept in the hands of the court, and that they made no effort to put an end to the said receivership.

20. That at no time during the pendency of the cause and the continuance of the receivership did the trustees, as trustees of either mortgage, seek to intervene therein or to take any action in regard to the property or to cause its restoration to the defendant.

21. That the counsel for the present interveners, being at the same time counsel for the trustees of the above mortgage and for the bondholders secured thereby, was, at all times during the continuance of the receivership, willing that it should continue; that they made no effort to have it ended, and that during the pendency of the receivership they consented to a continuance of the cause, by which the receivership was practically retained and continued.

22. That no creditor was hindered or delayed in his action against this defendant by the receivership.

23. That no attempt was made by either plaintiff or defendant to use the receivership to hinder, delay, or defraud creditors.

Defendant submits that by the record and testimony in this cause, which it offers, all the foregoing propositions are proven and established; and it further says that if, in the opinion of the master, after examining the record, he is in doubt as to the truth of the foregoing propositions or any of them the defendant, upon being notified that he desires further testimony at once, and upon being given reasonable time, will produce the same.

If, for any reasons, the master should refuse to make any of these findings defendant prays that he will incorporate this request in his report, together with his refusal. Wherefore, etc.

Respectfully,

B. C. BROWN,
Counsel for Defendant.

Circuit Court of the United States, Eastern District of Arkansas.

RUSSELL SAGE, Complainant,

versus

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant.

Before Hon. Charles P. Redmond, master, upon reference.

To the Hon. Charles P. Redmond, master:

The defendant respectfully prays that as matters of law you will find—

1. That the debt for which judgment was confessed on the twenty-fourth day of June, 1883, with the costs thereof, should first be paid out of the fund in court.

2. That the residue should be paid to the defendant.

3. That the interveners are not entitled to the fund in court or any part thereof.

4. That the costs should be paid by the interveners.

If, for any reason, you should refuse to make any of these findings defendant prays that you will incorporate this its request in your report, together with your refusal.

Respectfully,

B. C. BROWN,
Counsel for Defendant.

183 EXHIBIT Z[T].

Circuit Court of the United States, Eastern District of Arkansas, in Chancery Sitting.

RUSSELL SAGE, Complainant,
versus
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, (as Reorganized), Defendant. } No. 512.

MASTER'S OFFICE, *May* 12, 1884.

And now, on this day, May 12, 1884, the parties hereto come into the master's office to the reading of the report; and it is agreed by the parties that the final hearing on the master's report in his office be continued until May 22, 1884, when exceptions may be taken in the master's office.

And it is further agreed that the report of the master herein be printed and the expense thereof paid from the fund in this cause.

U. M. & G. B. ROSE,
For Interveners.
S. R. COCKRILL,
For Plaintiff.
B. C. BROWN,
For Defendant.

EXHIBIT Z[T].

In the Circuit Court of the United States, Eastern District of Arkansas.

RUSSELL SAGE *vs.* M. & L. R. R. Co., as Reorganized.

The plaintiff, Russell Sage, excepts to the master's report in this cause because—

I.

The master finds there was collusion between plaintiff and defendant for the purpose of hindering and delaying the creditors of the latter.

II.

The master finds that the creditors of defendant were hindered and delayed by plaintiff's action.

III.

The master fails to find that if the interveners herein were hindered and delayed in the collection of their debts they have, by their acts, waived the right to complain thereof, and are estopped therefrom.

IV.

The master fails to find that plaintiff's judgment is based upon a just and valid debt against defendant.

V.

The master fails to find that plaintiff's judgment should be first paid out of the fund in court.

Wherefore he prays that the master's report be disapproved as to the matters suggested, and that plaintiff's judgment be first paid out of the fund aforesaid.

S. R. COCKRILL.
Solicitor for Plaintiff.

Filed in master's office May 19, 1884.
CHARLES P. REDMOND, *Master.*

184 EXHIBIT Z^x.

In the Circuit Court of the United States, Eastern District of Arkansas.

RUSSELL SAGE, Plaintiff,

versus

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Defendant.

The defendant comes and excepts to the report of the master in this cause for the following causes:

1. For that the master erroneously finds that all creditors of the defendant were hindered and delayed of their action against the defendant by the judgment in this cause and receivership therein, whereas, as defendant alleges, there is no testimony in the record showing or going to show that any creditor of defendant was so hindered or delayed, and the said finding of the master is wholly unsupported by any evidence.

2. For that the master erroneously finds and reports that all creditors of the defendant were hindered and delayed of their action against defendant by the judgment and proceedings in this cause and receivership therein without giving or stating the name of any creditor who was so hindered or delayed.

3. For that the master erroneously finds that all creditors of defendant were, by the receivership had and instituted in this cause, hindered and delayed of their action against defendant; and also specially and as matter of fact finds that the creditors of defendant who intervened herein, and the trustees of all creditors of defendant who have appeared before the master, knew and were informed that the property of the defendant had in this action been placed in the possession of a receiver, were willing that such possession should continue, did no act and made no effort to put an end to such receivership, and did and consented to acts which continued such receivership; which said special findings of fact are contradictory of the general

finding first mentioned, and show that the only complaining creditors were not hindered or delayed of their action, or that if they were they consented thereto.

4. For that said master erroneously finds that all creditors of defendant were hindered and delayed of their actions against defendant by the receivership in this cause, and yet finds specially as facts that many actions at law were brought against defendant in this court; that such actions were brought by the creditors who intervened or sought to intervene in this cause, and who brought about the reference on their own behalf and judgments obtained; that actions in equity were brought by the same creditors to enforce the said judgments; that other actions were brought by the trustees of said creditors, and especially by the trustees of the mortgage, to the payment of which he reports that the fund in court should be appropriated; that to all such actions the defendant voluntarily entered its appearance, and that upon such appearance judgments and decrees were obtained; which said special findings of fact this defendant submits contradict the said general finding that "all creditors of defendant were hindered and delayed," and show that no creditor was so "hindered and delayed."

5. For that said master erroneously refused to find, as requested by the defendant, that the debt for which the defendant confessed judgment in favor of Russell Sage on June 24, 1882, was just and due, whether owned by said Sage or the Missouri Pacific Railroad Company, whereas it is shown and proven that on said date the said debt and the whole thereof was just and due.

6. For that the said master erroneously finds and reports that the moneys in court should be applied to the payment of bonds issued by the defendant May 1, 1877, and secured by a mortgage of trust conveyance of its property of same date, when in fact neither the holders of such bonds or any of them, nor the trustees of said deed, were or are parties to this cause or in any manner interested herein or in the disposition of said fund.

185 7. For that the said master erroneously finds and reports that the moneys in court should be applied to the payment of bonds issued by defendant May 1, 1887, payment of which was secured by defendant by a mortgage or deed of trust of same date of all its property, which conveyed property largely exceeded in value the total amount due on such bonds, when in fact all said moneys were derived from and were income of the property so conveyed, and when it does not appear that either the trustees of said mortgage or the holders of said bonds or any of them even demanded possession of the property either from the defendant or from the said receiver.

8. For that said master erroneously finds and reports that the moneys in court should be applied to the payment of bonds issued by the defendant May 1, 1887, payment of which was secured by defendant by a mortgage or conveyance in trust of same date of all its property, which conveyed property largely exceeded in value the total amount due on said bonds, when in fact, as appears by the records of this court referred to said master by the order of refer-

ence, the trustees of said mortgage exhibited their bill against defendant for the foreclosure thereof on the twenty-sixth day of June, 1883; that on April 7, 1884, a decree foreclosing the same and directing a sale of the property was rendered, from which said decree the defendant appealed to the Supreme Court of the United States, and upon the — day of ——, 1884, executed and filed its supersedeas bond, which was by the court approved, all of which record was known to the master before and when he made his said finding and report.

9. For that the master erroneously refused to find, as prayed by the defendant, that the said judgment in favor of Russell Sage against defendant, rendered June 24, 1882, with interests and costs, should be paid out of the funds in court.

10. For that the master erroneously refused to find, as requested by the defendant, that the interveners were not entitled to any part of the moneys in court.

11. For that the master refused to find, as requested by the defendant, that the interveners should pay the costs caused by the reference to the master.

12. For that the master erroneously finds that there was collusion between the plaintiff and defendant herein for the purpose and with the intent to hinder, delay, and defraud the creditors of defendant.

Wherefore defendant prays that in all the matters aforesaid the said report be disallowed and rejected, and that by proper order and decree the moneys in court be applied to the payment of the judgment in favor of said Russell Sage, and that the residue be paid to the defendant.

186 Which mortgages are in the words and figures following, to wit:

187 [In pencil:] Here follows copies of the mortgages referred to in master's report.

Preference Ten Per Cent. Mortgage.

This indenture, made and executed this first day of May, A. D. 1877, by and between the Memphis and Little Rock Railroad Company, as reorganized, a corporation duly incorporated and chartered by the act of the General Assembly of the State of Arkansas, approved January 11th, 1853, entitled "An act to incorporate the Memphis and Little Rock Plank or Railroad Company, and duly reorganized under said act and charter and the acts of the said General Assembly specially amendatory thereof, party of the first part, and William S. Pierson, R. K. Dow, and Watson Matthews, parties of the second part, witnesseth:

That whereas the party of the first part is desirous to borrow money to pay certain pressing expenses and is authorized by its said charter

to do so upon mortgage of its charter and works; and whereas the stockholders of the party of the first part at a general meeting, held at the office of the said company in the city of Little Rock, Arkansas, on the 30th day of April, A. D. 1877, by resolution duly adopted, did authorize the president and directors of said company to borrow two hundred and fifty thousand dollars, to be paid in installments of fifty thousand dollars each, respectively, on the first days of May in the years 1879, 1880, 1881, 1882, and 1883, with interest from date at ten per centum per annum, to issue the bonds of the company therefor, and to secure the payment of the principal and interest of said bonds by a mortgage of all and singular the charter, works, and property of said company; and whereas said com-
188 pany is about to issue, for the purpose and by the authority aforesaid, two hundred and fifty bonds of even date herewith, each for the sum of one thousand dollars, numbered from 1 to 250, inclusive, bearing interest from date at the rate of ten per centum per annum, payable semi-annually, the first fifty of which mature and become due on the first day of May, 1879; the second fifty of which mature on the 1st day of May, 1880; the third fifty of which mature on the first day of May, 1881; the fourth fifty of which mature on the first day of May, 1882, and the last fifty of which mature on the first day of May, 1883, which bonds are, with proper changes for maturity, in the following form:

Know all men by these presents that the Memphis and Little Rock Railroad Company, as reorganized, acknowledges itself indebted and promises to pay to the bearer hereof, at the office of the Central Trust Company of the State of New York, in the city of New York, on the first day of May, A. D. —, one thousand dollars, in lawful money of the United States of America, with interest from date at the rate of ten per centum per annum, payable semi-annually, at the place aforesaid, on the first days of May and November of each year upon presentation and surrender of the interest coupons thereto annexed as they severally fall due. This bond is one of a series of two hundred and fifty bonds of even date, each for one thousand dollars, numbered from 1 to 250, inclusive, of which fifty mature on the first day of May in the years 1879, 1880, 1881, 1882, and 1883; the payment of all which said bonds and interest is secured by a mortgage or trust deed, bearing even date herewith, by which said company has conveyed all and singular its charter, franchises, privileges, immunities, and property of every character and description to Wm. S. Pierson, R. K. Dow, and Watson Matthews, in trust, to secure the payment of the interest and principal of said bonds as they severally become due. This bond shall pass by delivery, and shall not become obligatory until authenticated by the signa-
189 tures of two of the said trustees to the certificate on the back hereof.

In witness whereof the said railroad company, as reorganized, has caused this bond to be signed by its president and its corporate seal to be hereto affixed, attested by the signature of its secretary, and has caused the interest coupons hereto annexed to be signed by its

treasurer under and in conformity to said deed this first day of May, A. D. 1877.

——— ———,
President of the Memphis and Little Rock Railroad Company, as Reorganized.

——— ———,
Secretary of the Memphis and Little Rock Railroad Comp'y, as Reorganized.

We, two of the trustees in the deed mentioned in the foregoing bond, do certify that this bond is one of the series of two hundred and fifty bonds secured by said deed.

——— ———,
——— ———,
Trustees.

Now, therefore, in consideration of the premises, and of the sum of one dollar to it paid by the parties of the second part, and to secure and make certain the payment of the several installments of principal and interest of said bonds as they severally become due and payable, the said party of the first part has bargained and sold, and by these present does grant, bargain, sell, and convey, unto the said parties of the second part, and to the survivor or survivors of them, as joint tenants, and not as tenants in common, all and singular its charter, granted by the act of assembly of the State of Arkansas aforesaid, with all its rights, powers, privileges, immunities, and franchises; and also all and singular its railroad and rights of way and easements from the west bank of the Mississippi river, in or near Hopefield, in Crittenden county, Arkansas, to Little Rock, in Pulaski county, Arkansas, the connections of said railroad with the
190 Little Rock and Fort Smith railway, and the Saint Louis, Iron Mountain and Southern railroad, its tracks, rails, ties, inclines, trestles, depots, rights of way, leases, easements, and privileges in the city of Memphis, in the State of Tennessee, all rails, trestles, ties, tracks, side tracks, switches, bridges, depots, stations, buildings, water tanks, machine shops, car-houses, engine-houses, warehouses, workshops, superstructures, engines, cars, wagons, machinery, tools, boats, wharf-boats, inclines, oil, fuel, supplies, and equipments that the said party of the first part now owns or may hereafter acquire in the States of Arkansas or Tennessee or elsewhere; and also all and singular all lands, real estate, property of every kind, real, personal, or mixed, all books of account, records, muniments, and evidences of title, and choses in action which the party of the first part now owns or may hereafter acquire, wherever situate; and also all the incomes, rents, issues, tolls, profits, receipts, rights, benefits, and advantages had, received, or derived by the party of the first part from any of the hereby-conveyed premises; to have and to hold unto the said party of the second part, and to the survivor or survivors of them, as joint tenants, and to their assigns, forever; and the party of the first part covenants with the party of the second part and their assigns that it is lawfully seized of the above-granted

property, charter, and franchises; has good right to convey the same in manner and form as it hereby does; that the same is free from incumbrance, and that the title thereto it will warrant and defend against all lawful claims whatsoever.

But this conveyance is made upon the following trusts and conditions, and none other, to wit:

First. That so long as the party of the first part shall not make default in the payment of principal or interest of said bonds it shall retain the possession of all the property hereby conveyed and receive and enjoy the income thereof; and that until such default the party of the first part shall have the right to sell and convey, free from this trust, any and all of the lands hereby granted not necessary or convenient to the operating of the said railroad, applying the proceeds thereof to the improvement and betterment of said railroad, its stock and equipments.

191 Second. Said party of the first part will, from time to time, as incurred, pay all charges, costs, and expenses of the parties of the second part, or either of them, incurred in or about the execution of the trust hereby reposed in them, and will indemnify and hold harmless the parties of the second part against all costs, charges, damages, and expenses which they or either of them may sustain or be put to in consequence of accepting this trust, or of anything which may be done or omitted to be done under it, saving only such damages as may be incurred by or arise from the culpable act or neglect of said parties of the second part.

Third. In case default shall be made by the party of the first part in the payment of any of the sums specified in the interest coupons annexed to said bonds or in any of the principal sums specified in said bonds, and shall continue for thirty days after the said sums or any of them become due and payable, then and thereupon the said principal sums in all said bonds specified shall immediately become due and payable, and thereupon the parties of the second part, upon the written request of the holders of a majority of said bonds, shall enter upon and take possession of all and singular the charter, franchises, and property hereby conveyed, and shall and may, on a day and at a place in the city of Little Rock to be by them appointed, sell the same to the highest bidder for cash in hand; first, however, giving thirty days' notice of the time, place, and terms of sale by advertisement printed in a newspaper published in the city of Little Rock and in a newspaper published in the city of New York; and the proceeds, after defraying the cost and expenses of this sale, they shall apply to the payment and discharge of all sums of principal and interest then due and unpaid on such bonds, and the residue they shall pay to the party of the first part or its assigns; and in case of such sale the said parties of the second part shall and may convey the property so sold to the purchaser, which deed shall convey all the title of the party of the first part to such property to the grantee therein; and

192 in case of such sale the party of the first part hereby expressly waives and relinquishes all right to redeem such sold and conveyed property which it may or might have under the laws of the State of Arkansas.

Fourth. In case either of the parties of second part should die or resign or become for any reason unable to execute the trusts of this deed or any of them, then all the trusts of this deed may and shall be executed by the survivors or survivor of them, and if all should die, resign, or become otherwise unable to execute the said trusts or any of them the holders of a majority of the said bonds may, by a writing under their hands, appoint another person or persons trustee of this deed, and all the trusts hereof shall and may be executed by the trustees so appointed as fully as they might or could have been by the parties of the second part, or either of them, and with like effect.

In testimony whereof the said Memphis and Little Rock Railroad Company, as reorganized, has caused this indenture to be signed by its president, and has caused its corporate seal to be affixed thereto by its secretary, attested by its said secretary, this the 1st day of May, A. D. 1877.

M. B. PRICHARD,
President of the Memphis and Little Rock Railroad Comp'y, as Reorganized.
JNO. W. GOODWIN,
Secretary of the Memphis and Little Rock Railroad Comp'y, as Reorganized.

STATE OF ARKANSAS, *County of Pulaski*.

Be it remembered that on the 1st day of May, A. D. 1877, before me, Frank Strong, an acting and duly commissioned notary public within and for the county of Pulaski, in the State of Arkansas, personally appeared M. B. Prichard, to me well known to be the person whose name appears subscribed to the foregoing deed, who, being by me first duly sworn, did make oath and say that he is the president of the Memphis and Little Rock Railroad Company, as reorganized; that the foregoing deed was authorized to be executed by the stockholders of the said company and by the
193 board of directors thereof, and that he signed the same as such president by order of the board of directors; and at the same time also appeared John W. Goodwin, to me well known to be the person whose name appears signed to the foregoing deed, who, being by me first duly sworn, did make oath and say that he is the secretary of the said company and the keeper of the corporate seal thereof; that the seal affixed to the foregoing deed is the seal of the said company; that he affixed it thereto by the order of the board of directors of said company, and each severally stated that said deed was by said company executed for the considerations and purposes therein mentioned and set forth.

In testimony whereof I hereto set my hand as such notary public and affix the seal of my office, at the city of Little Rock, in the county of Pulaski aforesaid, this 1st day of May, A. D. 1877.

(Signed) FRANK STRONG,
Notary Public, Pulaski County, Ark.

194 *General Mortgage.*

This indenture, made and executed this 2d day of May, 1877, by and between the Memphis and Little Rock Railroad Company, as reorganized, a corporation duly organized under the laws of the State of Arkansas, party of the first part, and William S. Pierson, R. K. Dow, and Watson Matthews, party of the second part, witnesseth:

That whereas the charter, franchises, and all other property of every kind, whether real or personal, belonging to the Memphis and Little Rock Railroad Company and to the Memphis and Little Rock Railway Company, as hereinafter more particularly described and set forth, was sold under a decree in chancery rendered by the United States circuit court for the eastern district of Arkansas in a certain cause therein pending, in which said William S. Pierson and others were plaintiffs and the said Memphis and Little Rock Railroad Company, the Memphis and Little Rock Railway Company, and others were defendants, which decree was rendered on the 21st day of November, 1876, said sale under said decree having been made on the 27th day of April, 1877; and whereas at the said sale the said property was purchased by the said Pierson, Dow, and Matthews in the interest and for the use and benefit of the holders of the bonds issued by the said Memphis and Little Rock Railroad Company and the said Memphis and Little Rock Railway Company, said bonds having been issued for the purpose of raising money for the construction and equipment of the railroad hereinafter described, with an agreement on the part of the said Pierson, Dow, and Matthews, acting as trustees for the said bondholders, that any new company organized for the purpose of operating the said railroad should issue bonds of an equal amount to that represented by the said bonds of the said Memphis and Little

195 Rock Railroad Company and of the said Memphis and Little Rock Railway Company, amounting in all to the sum of two millions six hundred thousand dollars, which bonds of such new company should be used in taking up the said bonds of the Memphis and Little Rock Railroad Company and of the Memphis and Little Rock Railway Company given for money borrowed for the construction and equipment of the said railroad as aforesaid; and whereas afterwards the said Memphis and Little Rock Railroad Company was duly reorganized under the laws of the State of Arkansas under the name of the Memphis and Little Rock Railroad Company, as reorganized; and whereas, after the said reorganization of the said company it was resolved by the stockholders of the said Memphis and Little Rock Railroad Company, as reorganized, that new bonds for the sum above named should be issued for the purpose of taking up the said bonds of the said Memphis and Little Rock Railroad Company and of the said Memphis and Little Rock Railway Company, in accordance with the said agreement under which the said purchase was made, and should execute a mortgage on the property hereinafter mentioned for the purpose of securing said bonds, and in form as hereinafter made and declared; and

whereas afterwards, by a resolution of the board of directors of the said Memphis and Little Rock Railroad Company, as reorganized, it was ordered that the president and secretary of said company issue the bonds and execute a mortgage on all the property hereinafter named, on the terms and conditions hereinafter set forth, for the purpose of securing the payment of the said bonds of said railroad company, as reorganized, according to their tenor and effect; and whereas the said party of the first part has issued or prepared for issue, for the purposes and by the authority aforesaid, twenty-five hundred and seventy-five bonds of one thousand dollars each, which are numbered from 1 to 2575, inclusive, and one hundred bonds of two hundred and fifty dollars each, which are numbered from 2576 to 2675, inclusive, amounting in the aggregate to the sum of two mil-
196 lions six hundred thousand dollars, all bearing even date herewith, and all of like tenor and substantially in the following form:

STATE OF ARKANSAS.

Memphis and Little Rock Railroad Company (as Reorganized).

Know all men by these presents that the Memphis and Little Rock Railroad Company (as reorganized) acknowledges itself indebted and promises to pay to —— —— or bearer, at the office of the Central Trust Company, in the city of New York, on the first day of July, A. D. nineteen hundred and seven, one thousand dollars of lawful money of the United States of America, with interest thereon from the 1st day of July, 1878, at the rate of four per centum per annum until the 1st day of July, 1882, and at the rate of eight per centum per annum from July first, 1882, until the maturity of this bond, payable at the times specified in the annexed coupons on presentation and surrender, at the office of the said Central Trust Company, of the interest coupons hereto annexed as they severally fall due; and the said railroad company hereby agrees with the holder of this bond that if default shall be made for sixty days in the payment of the interest coupons hereto annexed, that the principal sum of this bond shall immediately become due and payable.

This is one of a series of twenty-six hundred and seventy-five bonds; twenty-five hundred and seventy-five, numbered from 1 to 2575, inclusive, are for one thousand dollars each, and one hundred numbered from 2576 to 2675, inclusive, are for two hundred and fifty dollars each, amounting in the aggregate to twenty-six hundred thousand dollars, all of which bonds are secured by a mortgage or trust deed bearing even date herewith, which has been duly executed by said company to William S. Pierson, Watson Matthews, and R. K. Dow, as trustees, conveying to them, among other things, as more particularly set forth in said deed, the charter, franchises, road, rolling stock, income, lands, and other property of said company.
197 This bond shall pass by delivery, and shall not become obligatory until authenticated by the certificate of a majority of said trustees.

In witness whereof the said railroad company has caused this bond to be signed by its president, and caused its corporate seal to

be hereto affixed, attested by the secretary, and has also caused the interest coupons hereto annexed to be signed by its treasurer under and in conformity to said mortgage, this the 2d day of May, A. D. 1877.

—— ——, *President.*
—— ——, *Secretary.*

On which said bond the following endorsement is made: "The undersigned, a majority of the trustees, hereby certify that this bond is one of a series amounting in the aggregate to $2,600,000, secured by mortgage or deed of trust within mentioned, dated May 2d, 1877. Said mortgage or deed of trust is made subject to a prior mortgage for $250,000." And whereas said railroad company has determined to secure the payment of said bonds, with the interest thereon, in the manner herein provided: Now, therefore, the said Memphis and Little Rock Railroad Company, as reorganized, party of the first part, in order to secure the due and punctual payment of the beforementioned twenty-five hundred and seventy-five bonds and the accrued interest thereon, and for and in consideration of the premises and of the sum of one dollar paid by the party of the second part to the party of the first part, the receipt whereof at and before the ensealing and delivery of these presents is hereby acknowledged, hath granted, bargained, sold, aliened, remised, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, convey, and confirm, unto the said Pierson, Dow, and Matthews, party of the second part, as trustees and in trust, and their successor or successors, and his survivor or survivors and assigns forever, all and singular the railroad and rights of way from the west bank of the Mississippi river, in or near Hopefield, in the county of Crit-
198 tenden and State of Arkansas, to Little Rock, in the county of Pulaski and State of Arkansas, with the connections of said railroad with the Cairo and Fulton railroad and the Little Rock and Fort Smith railroad, and any railroad depots or rights of way in the city of Memphis, State of Tennessee, belonging to said railroad company, and all rails, trestles, ties, tracks, side tracks switches, depots, stations, buildings, water tanks, machine shops, car-houses, engine-houses, warehouses, workshops, superstructures, engines, cars, wagons, machinery, tools, boats, wharf-boats, inclines, oil, fuel, supplies, and equipments which said railroad company, party of the first part, now own or may hereafter acquire or become entitled to in the States of Arkansas or Tennessee or elsewhere, pertaining to the main line of said road from Memphis to Little Rock, and also all and singular all lands, real estate, property of every kind, real, personal, or mixed, books of account, records, muniments, and evidences of title and choses in action which are now owned or may hereafter be acquired by said railroad company, party of the first part, and also the charters, franchises, rights, privileges, and immunities, including the right or franchise to be a corporation, which the said railroad company now own or possess or may hereafter own or acquire in the States of Arkansas and Tennessee or elsewhere, and also all the income, rents, issues, tolls, profits, receipts, moneys,

rights, benefits, and advantages had, received, or derived by the said railroad company from its railroad or other property or in any other way whatsoever; to have and to hold all and singular the said premises, properties, and things and rights and privileges, immunities, charters, and franchises, with their appurtenances, hereby conveyed or intended to be conveyed to said party of the second part, their successor or successors, and his or their survivor or survivors and assigns forever; and the said Memphis and Little Rock Railroad Company, as reorganized, hereby covenants with the party of the second part that it is lawfully seized and possessed of the said granted property, has good right to convey the same in manner and form as aforesaid, and that the same is clear of all incumbrances whatsoever except the above-described mortgage of the Mem-
199 phis and Little Rock Railroad Company, and as hereinbefore recited, and that it will forever warrant and defend the title thereto against all lawful claims whatsoever: Provided, however, That this conveyance is upon the conditions following, to wit:

First. That so long as the said party of the first part shall not make default in the payment of either principal or interest on any of the aforesaid bonds and coupons, as the same may respectively become due and payable, and shall faithfully perform the conditions of said bonds and the stipulations and conditions of this indenture, said party of the first part shall be entitled to retain the possession of the railroad and other property hereby conveyed, and receive and enjoy the income thereof.

Second. And said party of the first part shall, in each and every year after the year 1882, pay to said party of the second part, their survivor or survivors, successor or successors, for the time being, such sum of money as shall be equal to the difference between the interest for each year on all outstanding bonds secured by this mortgage and the sum of two hundred and eighteen thousand dollars; such sum to be paid on the 1st day of January in each year, commencing on the 1st day of January, 1883, with the payment of ten thousand dollars, such moneys to be used by the trustees in the purchase of bonds secured by this mortgage at the lowest price at which they can be had, the bonds so purchased and all coupons attached thereto to be carefully cancelled by the trustees and returned to the company. And said party of the first part further agrees to pay to said trustees, or such trustee as shall take the active management of said sinking fund, one per centum of the par value of the bonds bought in and cancelled by them, which shall be received as compensation therefor.

Third. And it is further agreed that in case the party of the first part shall fail or neglect to comply with this provision for the purchase of the said bonds then the said party of the second part, their survivor or survivors, successor or successors, shall have the same right to enter upon or sell and convey the property herein
200 conveyed that they would have under the terms of this conveyance in case of the non-payment of the interest or principal of the said bonds in every respect whatever.

Fourth. Said railroad company, as reorganized, will from time to

time, as incurred, pay all charges, costs, expenses, and compensation of the said party of the second part and their successor and successors, or survivor or survivors, in or about or for the execution of said trust, and will in all things keep the said trustees or their successors fully indemnified and saved harmless of, from, and against all costs, damages, charges, and expenses which said trustees or their successors may sustain or be put to in consequence of accepting this trust, or of anything which may be done or omitted to be done under it, saving only such damages as may arise from any culpable act or neglect of said trustees. And said railroad company, party of the first part, will cause this deed to be duly recorded in all proper places, and will do whatever else may be necessary or proper to give full effect to this conveyance.

Fifth. In case default for the space of sixty days shall be made in the payment of any of said interest coupons, or of the principal sum of any of said bonds, as they shall respectively fall due, the said party of the second part, their successor or successors, and his their survivor or survivors, on the written request of one-third in interest of the holders of said bonds, by themselves or by their agent thereto duly authorized, either of said trustees being competent to act as the agent of the other trustees, upon being furnished with funds for expenses and being suitably indemnified against risk and loss, may and shall enter in and upon and take possession of and operate all and singular the said railroad and all other property, real, personal, or mixed, hereinbefore conveyed or intended to be conveyed and take and receive the income and profits thereof; and may and shall sell all and singular said railroad and lands and all other property, real, personal, or mixed, with all the charters, rights, privileges, immunities, franchises and choses in action of said railroad company, party of the first part, hereinbefore conveyed or intended to be conveyed, and execute and deliver to the pur-
201 chaser or purchasers deeds and conveyances, which shall vest in such purchaser or purchasers all the estate, right, title, and interest, whether legal or equitable, of said party of the second part, and of said railroad company, party of the first part, in fee simple, absolute, free of equity, or redemption of, in, or to said railroad lands, property, charters, rights, privileges, immunities, and franchises, and every part and parcel thereof, and said deeds and conveyances shall forever bar and estop said railroad company, party of the first part.

And the said party of the first part hereby covenants and agrees that said party of the second part, their successor or successors, and his or their survivor or survivors, may make said sale as aforesaid in the city of Little Rock or in any town on the line of their said railroad and with or without entry on said conveyed premises, and may make said sale as aforesaid by or through his or their agent or attorney-in-fact with the same force and effect as if made by him or them in person or through their proper officers.

And the said party of the first part hereby waives the benefit of any stay, extension, appraisement, or valuation laws which may now or hereafter exist, but before any sale shall be made notice of such

intended sale shall be published once in each week for not less than four consecutive weeks in one newspaper published in the city of Little Rock, Arkansas, and in one newspaper published in the city of Memphis, Tennessee.

And the said party of the first part hereby covenants and agrees that said party of the second part may adjourn said sale as many times and for such length of time as they see fit, and any sale made on an adjourned day shall be of the same force and effect as if made on the day first appointed.

And the proceeds of such sale, if made for cash, after paying the costs, charges, and expenses of the said party of the second part or their successors, and of their or his agents or attorneys at law or in fact, incurred in and about the said trust and the said foreclosure, sale, and conveyance, shall be distributed *pro rata* to the holders of the bonds without regard to priority of issue and coupons secured by this trust, but neither in the case of a sale for money nor
202 in the case of any other sale, judicial or otherwise, shall any of the coupons or interest warrants from said bonds be entitled to or share any of the proceeds of such sale unless the same are held and owned by the actual holders and owners of the bonds to which said coupons were respectively attached at the issue of said bonds; and it is expressly agreed that such coupons as may be held by any other person than the actual owner or holder of the bonds to which they were respectively originally attached shall be considered merely as an unsecured promissory note of said railroad company, and shall not be entitled to the security of this deed of trust; and any surplus after any sale for money and after making full payment and satisfaction of all the aforesaid bonds, coupons, and interest and the costs, charges, and expenses as aforesaid shall be paid over to the party of the first part.

Sixth. And it is further covenanted and agreed by and between the parties hereto that in case of a sale, whether judicial or otherwise, of said premises embraced in this mortgage the amount of the bid or purchase-money on said sale may be paid and satisfied in whole or in part by the outstanding bonds or coupons, save the detached coupons aforesaid or any of them secured hereby, and said bonds and coupons shall be received in whole or in part payment and satisfaction by the said trustees, their successor or successors, or his or their survivor or survivors, according to their value, to be ascertained and determined by the net amount arising from said sale.

And it is further covenanted and agreed by and between the parties hereto that in case of any sale, judicial or otherwise, of the premises embraced in this mortgage and the holders of a majority in interest of the then outstanding bonds secured by this mortgage shall, in writing, request the said trustees or their successor or successors or his or their survivor or survivors so to do, they or he is authorized to purchase the premises embraced herein for the use and benefit of the holders of the then outstanding bonds and coupons secured by this mortgage; and that having so purchased said premises the right and title thereto shall vest in said trustees, and no

bondholder shall have any claim to the premises or to the
203 proceeds thereof, except for his *pro rata* share of the proceeds of said premises as represented in a new company or corporation to be formed by a majority in interest of said bondholders, for the use and benefit of the holders of the bonds secured hereby.

And whenever the holders of a majority of said bonds shall have organized a new company or corporation for the use and benefit of all the holders of the bonds secured by this mortgage said trustees or their successor or successors, or his or their survivor or survivors, shall reconvey the premises so purchased by him or them to said new company or corporation.

And it is further agreed that said trustees or either of them may resign and discharge themselves of this trust on publishing notice of such intention to resign in a newspaper published in the city of New York at least thirty days before such resignation, filing a copy of such resignation with the clerk of the county of Pulaski, in the State of Arkansas, and leaving such resignation with the president or secretary of said Memphis and Little Rock Railroad Company, as reorganized, and that the circuit court of the United States for the eastern district of Arkansas, in case of the death, resignation, or removal of any trustee, on a petition of one-third of the holders of the then outstanding bonds secured by this mortgage, shall appoint a successor or successors in such trust, and the said trustee or trustees so appointed shall thereupon become vested with all the powers, authorities, and estates granted to or conferred upon said party of the second part by these presents, and all the rights and interests requisite to enable them to execute the purposes of this trust without any further assurance or conveyance.

Seventh. And the party of the first part hereby agrees that said party of the second part, their successor or successors, or his or their survivor or survivors, may appoint and employ at the expense of the said trust estate all such attorneys, counsellors, agents, clerks, cashiers, book-keepers, engineers, or other agents as may be reasonably necessary in the execution of any of the trusts herein or hereby declared or created, and may fix their compensation, and shall not be answerable for the defaults or other misconduct or neglects
204 of such attorneys, counsellors, cashiers, clerks, book-keepers, engineers, or other agents, unless chargeable with culpable negligence in their selection; and, further, that neither of said trustees shall be answerable for the acts, omission, or defaults of his associate or associates, nor shall either of them or their successor or successors or survivors or survivor be responsible for anything short of gross negligence or wilful defaults in the discharge of his duties.

And the party of the first part hereby declares and agrees that where the words "trustee" or "trustees" or "party of the second part" are hereinbefore mentioned it shall mean and be construed to mean the party of the second part and their successor or successors, whether named in this indenture or appointed by the court, and his or their survivor or survivors and assigns.

And said party of the first part further agrees that the lithograph

signature of its treasurer upon the coupons attached to the bonds hereinbefore mentioned shall be deemed the written signature of its said treasurer and of equal force and effect.

In witness whereof the said Memphis and Little Rock Railroad Company, as reorganized, hath caused this indenture to be subscribed by its president and secretary and treasurer and hath caused its corporate seal to be hereunto affixed on the 2nd day of May, 1877.

(Signed) M. B. PRICHARD, *President.*
[SEAL.] (Signed) JNO. W. GOODWIN,
Secretary and Treasurer.

Witness:
—— ——.

STATE OF ARKANSAS, }
County of Pulaski, } *ss:*

On this day, before me, a duly appointed, commissioned, and qualified notary public in and for said county, came M. B. Prichard and John W. Goodwin, to me well known as the persons executing the foregoing deed, and the said M. B. Prichard, being by me
205 duly sworn, made oath that he is the president of the Memphis and Little Rock Railroad Company, as reorganized, and that the seal of said company thereto attached is the genuine seal of the said company, and that the same was duly attached to the said deed by his direction and in his presence on this day; and the said John W. Goodwin, being duly sworn, made oath that he is the secretary and treasurer of said Memphis and Little Rock Railroad Company, as reorganized, and that the said seal is the genuine seal of the said company, and that the same was duly attached to the said deed in his presence on this day, and both the said M. B. Prichard and the said John W. Goodwin acknowledged that they had respectively executed the said deed in their official capacity as such president and secretary and treasurer for the consideration and purposes therein mentioned and set forth.

(Signed) M. B. PRICHARD,
President.
[SEAL.] (Signed) JNO. W. GOODWIN,
Secretary and Treasurer.

Sworn to and subscribed before me.
Witness my hand and official seal, at the city of Little Rock, this 2d day of May, 1877.

(Signed) FRANK STRONG,
Notary Public.

NOTE.—The foregoing deed of trust is recorded in—

Pulaski county,	Record	Book	A B[6],	page	178, May 3, 1877.
Lonoke county,	"	"	J	"	275, May 8, 1877.
St. Francis county,	"	"	U	"	131, &c., May 21, 1877.
Cross county,	"	"	D	"	39 to 50, May 24, 1877.
Prairie county,	"	"	D	"	30 to 37, May 11, 1877.
Woodruff county,	"	"	F	"	388 to 367, May 15, 1877.
Monroe county,	"	"	F	"	401 to 415, May 19, 1877.
Lee county,	"	"	F	"	305 to 314, May 28, 1877.
Crittenden county,	"	"	S	"	183 to 191, May 30, 1877.
Shelby Co., Tenn.,	"	"	119	"	42 to 54, June 16, 1877.

206 *Supplemental Mortgage.*

This indenture, made by and between the Memphis and Little Rock Railroad Company, as reorganized, a corporation duly organized under the laws of the State of Arkansas, party of the first part, and William S. Pierson, R. K. Dow, and Watson Matthews, party of the second part, witnesseth:

That whereas the said party of the first part executed to the said party of the second part its certain deed of mortgage, dated on the second day of May, 1877, and by inadvertence there was omitted from the said mortgage the following clause—that is to say: "That so long as the party of the first part shall not make default in the payment of principal or interest of said bonds it shall retain possession of all the property hereby conveyed and receive and enjoy the income thereof, and that until such default the party of the first part shall have the right to sell and convey, free from this trust, any and all of the lands hereby granted not necessary or convenient to the operating of the said railroad, applying the proceeds thereof to the improvement and betterment of said railroad, its stock and equipments;"

And whereas none of the bonds mentioned in the said mortgage have as yet been issued, and it is desired to correct the said omission, it is now agreed between the parties hereto that the clause thus omitted from the said mortgage shall form a part thereof, with the same effect, to all intents and purposes, as if it had been incorporated in the said mortgage immediately before the attesting clause of said mortgage; and, in order that all persons interested may have notice of this amendment, it is further agreed that this indenture shall be recorded in the several counties in which the lands
207 mentioned in said mortgage lie, and that there shall be an indorsement on each of the said bonds to be secured by the said mortgage a reference to this indenture.

In testimony whereof the said Memphis and Little Rock Railroad Company, as reorganized, hath caused this indenture to be subscribed by its president and secretary and treasurer, and hath caused its corporate seal to be hereunto affixed, on this 26th day of September, in the year of our Lord 1877.

[SEAL.] (Signed) M. B. PRICHARD,
President.
JOHN W. GOODWIN,
Sec'y and Treas.

STATE OF ARKANSAS, } ss:
County of Pulaski, }

On this day before me, a duly appointed, commissioned, and qualified notary public in and for said county, came M. B. Prichard and Jno. W. Goodwin, to me well known as the persons executing the foregoing deed, and the said M. B. Prichard, being by me duly sworn, made oath that he is president of the Memphis and Little Rock Railroad Company, as reorganized, and that the seal thereto attached is the genuine seal of said company, and that the same was duly attached to the said deed by his direction and in his presence on this day; and the said Jno. W. Goodwin, being duly sworn, made oath that he is secretary and treasurer of said Memphis and Little Rock Railroad Company, as reorganized, and that the said seal is the genuine seal of the said company, and that the same was duly attached to the said deed in his presence on this day; and both the said M. B. Prichard and the said Jno. W. Goodwin acknowledged that they had respectively executed the said deed in their official capacity as such president and secretary and treasurer for the consideration and purposes therein mentioned and set forth.

——— ———.
——— ———.

Sworn to and subscribed before me.

Witness my hand and official seal as such notary public, at the city of Little Rock, on this 26th day of September, 1877.

[SEAL.] (Signed) J. D. DARDEN,
Notary Public, Pulaski County, Arkansas.

208 And on May 24, 1884, the following proceedings were had:

Come R. K. Dow, Watson Matthews, and Charles Moran, W. A. Goodwin, Charles Moran, G. T. Bonner, Thos. Stokes, Simon Borg, Amos R. Eno, Wm. Breck, Geo. N. Farwell, H. N. Shelden, L. Levy, Henry Sanford, Ira Colby, Henry N. Shelden, R. K. Dow, Wm. Clark, Wm. Breck, E. M. Barnes, H. M. Juilliard, E. C. Stokes, May C. Dodge, A. D. Juilliard, Geo. E. Dodge, Geo. Dow, W. G. Wheeler, W. G. Wheeler, H. E. Bailey, John L. Farwell, F. H. Cossitt, Wm. M. Chamberlain, and Martha L. Dow, by U. M. & G. B. Rose, Esqs., their solicitors, and file herein their exceptions to report of master

And on May 27, 1884, the following proceedings were had:

And now comes the master herein, Charles P. Redmond, and files herein the agreement of counsel as to his compensation, which agreement is in words and figures following:

"We agree that five thousand dollars is a reasonable compensation for the master for his services in this cause and
209 *and* in case No. 543, Dow and Matthews *vs.* same defendant, and No. 469, John Overton, trustee, *vs.* same defendant, for services rendered and to be rendered, and the same is proper to be paid from the fund in court in this cause.

U. M. & G. B. ROSE,
For Intervenors & Trustees of 1st & 2nd Mortgages of M. & L. R. R. R. Co., as Reorganized."

I am familiar with the duties of the master in the above-named cases, and consider the amount above named is no more than a reasonable compensation for his services therein, but I have no power to consent to his being paid out of this fund.

B. C. BROWN,
Solicitor for Defendant.
S. R. COCKRELL, *For Pl'ff.*

And it appearing to the court that said compensation is proper to be allowed—

It is ordered that the clerk of this court draw his warrant upon the fund in this cause to the order of Charles P. Redmond, said master, for the sum of five thousand dollars, and deliver the same to him, taking his receipt therefor.

210 And on June 25, 1884, the following proceedings were had:

Comes the complainant, by S. R. Cockrell, his solicitor, the defendant, by B. C. Brown, its solicitor, and the interveners, by U. M. & G. B. Rose, their solicitors, and by agreement of counsel it is ordered that the exception to the master's report herein be submitted to the court with leave to parties to file briefs by August 1st, 1884.

And on August 8th, '84, the following proceedings were had:

Now, on this day, came said plaintiff, by S. R. Cockrell, Esq., his solicitor, and also came said defendant, by B. C. Brown, Esq., its solicitor, and also came said Robert K. Dow and Watson Matthews and the other intervening creditors of said defendant herein, by U. M. & G. B. Rose, Esqs., their solicitors, and the court having duly considered of and concerning the exceptions to the report of the master herein—.

It is now ordered and considered that said exceptions be,
211 and the same are, overruled, and that said report of the master be in all things approved and confirmed; and it is now ordered and considered that said moneys now in the registry of this court in the cause be paid to Robert K. Dow and Watson Matthews as surviving trustees named in a mortgage or deed of trust executed to said Dow and Matthews and to William S. Pierson, the latter of whom has since died, said mortgage bearing date May 1, 1877, said moneys to be distributed by said surviving trustees among the beneficiaries under said mortgage, and that said plaintiff pay all the costs of this suit; and said plaintiff prays an appeal from this decree to the Supreme Court of the United States, which is granted; and said plaintiff, by leave of the court, files herein his appeal bond, with Sydney Dillon as his surety, in the penal sum of ten thousand dollars, conditioned according to law; and said defendant also prays an appeal to the Supreme Court of the United States, which is granted, and said defendant, by leave of the court, files here its appeal bond in the penal sum of one hundred thousand dollars, conditioned according to law, with Jay Gould as surety, and both of said bonds are approved by the court, and it is ordered that each of them operate as a supersedeas herein.

212 Which supersedeas bond is as follows:

Know all men by these presents that we, Russell Sage and Sydney Dillon, of the city of New York, are held and firmly bound unto the Memphis and Little Rock Railroad Company, as reorganized, in the sum of ten thousand dollars, to be paid to the said Memphis and Little Rock Railroad Company, as reorganized; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 7th day of August, 1884.

Whereas the above-named Russell Sage hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the eastern district of Arkansas:

Now, therefore, the condition of this obligation is such that if the above-named Russell Sage shall prosecute his said appeal to effect and answer all costs and damages if he shall fail to make
213 good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

RUSSELL SAGE,
By S. R. COCKRELL,
Att'y-in-Fact.
SYDNEY DILLON,
By S. R. COCKRELL,
Att'y-in-Fact.

Endorsed: Filed Aug. 8, 1884. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

214 Which supersedeas bond is as follows:

Know all men by these presents that we, the Memphis and Little Rock Railroad Company, as reorganized, and Jay Gould, of the city of New York, are held and firmly bound unto Russell Sage, of the city of New York, in the sum of one hundred thousand dollars, to be paid to the said Russell Sage, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators.

In testimony whereof the above-bounden Memphis & Little Rock Railroad Company, as reorganized, has caused this bond to be sealed with its corporate seal and attested by the hand of its secretary, and the above-bounden Jay Gould has hereto set his hand this — day of ——, 1884.

215 Whereas the above-named Memphis & Little Rock Railroad Company, as reorganized, hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the eastern district of Arkansas:

Now, therefore, the condition of this obligation is such that if the above Memphis & Little Rock Railroad Company, as reorganized,

shall prosecute its said appeal to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JAY GOULD,
By B. C. BROWN,
His Attorney-in-Fact.

Endorsed: Filed August 8, 1884. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

216 And on October 11, 1884, the following proceedings were had:

On this day came the parties, by their counsel, S. R. Cockrell for complainant and B. C. Brown for defendant and U. M. & G. B. Rose for interveners, and file herein their agreement as to the manner in which the transcript of the record of this cause shall be made and providing for omission of papers which are mere copies of others inserted in the transcript, which, being read, is by the court approved; and it is ordered that said agreement be made a part of the record and transcript.

Which agreement is in the words and figures following, to wit:

In order to lessen the size of the transcript for the Supreme Court in this case it is agreed by counsel that the clerk shall copy in the transcript the claim and intervention of F. H. Cossitt; and it is agreed that similar claims were filed for and by Amos R. Eno Dec. 1, 1883, for a judgment for $58,945.02 and costs of suit,
217 dated October 10, 1883; for Harry Talmadge, filed on the same day, for $3,574.17 and costs, dated Oct. 24, 1883, said judgments having been rendered in this court and on coupons of the same issue as those referred to in said claim and intervention of said F. H. Cossitt; and all of said petitions, save that of said Cossitt, may be omitted from the transcript without prejudice, it being admitted that with the exception of the dates and amounts of said judgments the petitions were, word for word, the same as that of said Cossitt.

The clerk shall copy in said transcript the claim and petition of Ira S. Colby, filed herein on the 19th day of February, 1884, but shall omit therefrom a like petition of W. B. Miller on a judgment for $1,276.60, rendered on the 3rd day of May, and a petition filed by Wm. Breck on a judgment for $3,705.52, rendered on the 18th day of April, 1883; a petition filed by H. Sanford on a judgment for $616.60, rendered on the 17th day of April, 1883; a petition filed by E. W. Barnes on a judgment for $1,419.33,
218 rendered on the 21st day of April, 1883; a petition filed by Thomas Stokes on a judgment for $571.86, rendered on the 24th day of October, 1883; a petition filed for R. K. Dow on a judgment for $4,528.48, rendered on the 17th day of April, 1883; a petition filed by William Clark on a judgment for $4,884.80, rendered

on the 17th April, 1883; a petition filed by William Clark on a judgment for $4,884.80, rendered on the 17th day of April, 1873; a petition filed by W. B. Miller on a judgment for $815.20, rendered on the 24th day of October, 1883; a petition filed by G. T. Bonner & Co. on a judgment for $616.60, rendered on the 17th day of April, 1883; a petition filed by Charles Moran on a judgment for $4,867.72, rendered April 11, 1883; a petition filed by F. H. Cossitt on a judgment for $4,903.89, rendered April 17, 1883; a petition filed by E. C. Stokes for two judgments, one for $4,926.70, rendered April 19, 1883, and the other for $3,051, rendered Oct. 24, 1883; a petition filed by Wm. M. Chamberlain on a judgment rendered April 19, 1883, for $678.48; a petition filed by H. M. Juilliard on a
219 judgment for $4,626.75, rendered April 19, 1883, and on another judgment for $3,057, rendered Oct. 24, 1883; a petition filed by H. E. Bailey on a judgment for $3,084, rendered April 19, 1883; a petition filed by M. C. Dodge on two judgments, one for $4,626.75, rendered April 19, 1883, and the other for $3,157, rendered Oct. 24, 1883; a petition filed by M. L. Dodge on a judgment for $4,625.25, rendered April 17, 1883; a petition filed by Wm. A. Goodwyn on a judgment for $1,172.36, rendered Oct. 24, 1883; a petition filed by W. G. Wheeler on a judgment for $2,725.23 rendered April 19, 1883, and another judgment for $4,891.20, rendered Oct. 24, 1883; a petition filed by George E. Dodge on a judgment for $4,626.75, rendered April 19, 1883, and another judgment for $2,486.36, rendered Oct. 24, 1883; a petition filed by George Dow on a judgment for $4,723.52, rendered April 19, 1883; a petition filed by A. D. Juilliard on two judgments, one for $4,626.75, rendered April 19, 1883, and the other for $3,057, rendered October 24, 1883; a petition filed by John L. Farwell on two judgments, one for $3,384.51, rendered April 17, 1883, and the other for $3,342.76,
220 rendered Oct. 24, 1883; a petition filed by W. P. Miller on a judgment for $782.25, rendered Oct. 24, 1883, all of said last-named petitioner- setting up said judgments as being rendered on the common law side of this court and said petitions being all, word for word, the same as the petition of said Ira S. Colby, except the dates and amounts of said judgments. This agreement shall stand in place of said omitted transcripts and neither party to be prejudiced by said omissions; also said clerk shall omit from said transcript all schedules and reports of the receiver, it being admitted that the amount of money reported by the master herein as being in the hands of the receiver is correct and no question being reserved on the accounts of said receiver. It is also admitted that exceptions were filed to the master's report by all of the parties filing said petitions, and they were all overruled. The exception filed by the said Cossitt may be copied in the transcript, and it shall stand for all the exceptions made by the other parties, they being all, word for word, alike; also agreed that exceptions in words and figures the same as those filed before the master
221 and reported by him were filed in court by both plaintiff

and defendant, and that they were overruled by the court Oct. 11, 1884.

U. M. & G. B. ROSE,
For Intervenors.
S. R. COCKRELL,
For Complainants.
B. C. BROWN,
For Defendant.

Endorsed: Filed Oct. 11, 1884. Ralph L. Goodrich, clerk. W. P. Field, D. C.

Which claim and intervention of F. H. Cossitt is in words & figures following, to wit:

Comes here F. H. Cossitt and begs leave to intervene herein for his own interest and to participate in the fund in the hands of the court in this cause, and respectfully show as follows:

On the first day of May, 1877, the said defendant executed its mortgage of that date to William S. Pierson, R. K. Dow, and Watson Matthews, by which it conveyed to them its road and all
222 of its property and income of every kind then owned or afterwards to be acquired by said company in order to secure the payment of certain bonds, amounting in all to $250,000, and the interest to accrue thereon, a copy of which mortgage is herewith filed, marked Exhibit "A," and made part hereof. Said mortgage creates a first mortgage lien on said property.

On the 10th day of November, 1883, the petitioner recovered judgment in this court against said defendant for $9,461.55 for principal and interest accrued on certain of said bonds owned by said petitioner.

This suit was brought by said plaintiff in collusion with said defendant, not for the purpose of collecting said judgment in favor of the plaintiff in good faith, but for the purpose of placing said property in the hands of a receiver so as to cheat, hinder, and delay the creditors of the defendant and particularly your petitioner, and to that end the said receiver was kept in possession of said property until he was discharged by the court, of its own motion, on the express ground that it appeared on the face of the papers that
223 this suit was fraudulent, simulated, and collusive.

During the time that said receiver was kept in possession of said property by the fraudulent abuse of the powers of a court of equity the fund now in the registry of the court accumulated in his hands from the operation of said railroad.

Petitioner does not know whether said judgment in favor of the plaintiff was rendered for a valid debt or not, but charges that if it was a valid debt it was collusively and unnecessarily created, with the sole object of bringing this fraudulent and collusive suit for the purpose aforesaid.

Wherefore petitioner prays that his said judgment and the costs therein adjudged may be paid him out of said fund, and for all other and proper relief.

W. M. & G. B. ROSE,
For Petitioner.

Endorsed: Filed Feb. 19, 1884. Ralph L. Goodrich, clerk.

224 Which said claim and intervention of Ira S. Colby is in words and figures following, to wit:

Comes here Ira S. Colby and begs leave to intervene herein for his own interest and to participate in the fund in the hands of the court in this cause, and respectfully shows as follows:

On the second day of May, 1877, the said defendant executed its mortgage of that date to William S. Pierson, R. K. Dow, and Watson Matthews, by which it conveyed to them its road and all of its property and income of every kind then owned or afterwards to be acquired by said company in order to secure the payment of certain bonds, amounting in all to $2,600.00, and the interest to accrue thereon, a copy of which is herewith filed, marked Exhibit "A," and made part hereof. Said mortgage creates a second-mortgage lien upon said property.

On the 17th day of April, 1883, the petitioner recovered judgment in this court against said defendant for $3,277.43 for principal and interest accrued on certain of said bonds owned by said petitioner.

225 This suit was brought by said plaintiff in collusion with said defendant, not for the purpose of collecting said judgment in favor of the plaintiff in good faith, but for the purpose of placing said property in the hands of a receiver, so as to cheat, hinder, and delay the creditors of the defendant, and particularly your petitioner; and to that end said receiver was kept in possession of said property until discharged by the court, of its own motion, on the express ground that it appeared on the face of the paper that the suit was fraudulent, simulated, and collusive.

During the time that said receiver was kept in possession of said property by the fraudulent abuse of the power of a court of equity the fund now in the registry of this court accumulated in his hands from the operation of said railroad.

Petitioner does not know whether said judgment in favor of the plaintiff was rendered for a valid debt or not, but charges that if it was a valid debt it was collusively and unnecessarily created with the sole object of bringing this fraudulent and collusive suit for the purposes aforesaid.

Wherefore the petitioner prays that his said judgment
226 and the costs therein adjudged may be paid him out of said fund, and for all other proper relief.

U. M. & G. B. ROSE,
For Petitioner.

[Endorsed:] Filed Feb. 19, 1884. Ralph L. Goodrich, clerk.

227 *Exception of F. H. Cossitt to Master's Report.*

Comes F. H. Cossitt and excepts to the report of the master herein, because he says that the master should have found that he was entitled to the payment of his claim before the payment of any other demand against the fund herein.

U. M. & G. B. ROSE, *Solicitors.*

[Endorsed:] Filed May 24. 1884. Ralph L. Goodrich, clerk.

228 The following opinion of Geo. W. McCrary, U. S. circuit judge, was filed in this cause on Dec. 3, 1883:

Prior to the removal of this cause from the State court a receiver had been appointed and placed in charge of the railroad property and franchise of the defendant corporation. The case came before the court upon the application of Robert H. Dow and John L. Farwell, stockholders of the defendant corporation, to be made parties and to be allowed to file answer and cross-bill, which are tendered. Upon the argument of this motion the court requested counsel to discuss the question whether the court should not, of its own motion, upon the facts appearing in the record, order the receiver to pass his accounts before the master, to the end that he may be discharged and the court be relieved from the duty of conducting through
229 a receiver the business of the defendant corporation. This question has accordingly been discussed by counsel for the plaintiff, but the counsel for the said Dow and Farwell declined to argue it upon the ground that the parties represented by them were not interested therein.

The facts are as follows:

1st. This suit was originally in the chancery court of Pulaski county, Arkansas, for the purpose of obtaining the appointment of a receiver to take possession of and operate the railroad and other property of the defendant, and upon presentation of a bill of complaint to that court on the 24th day of June, 1882, one E. H. Sibley was appointed such receiver and placed in possession of the property. The defendant waived notice, appeared at the hearing, and consented to the appointment.

2nd. The bill alleges, as ground for the appointment of a receiver, that plaintiff had recovered judgment in the circuit court of the
230 United States for the eastern district of Arkansas for $125,921.13. By reference to the transcript of the judgment, it appears that it was rendered by confession upon the same day the application for appointment of a receiver was made. The bill also alleges that the defendants' property consists of a railroad running through the counties of Pulaski, Lonoke, Prairie, Monroe, St. Francis, and Crittenden, together with cars, rolling stock, and other property used in the management and operation of the road. It sets out the existence of two mortgages upon the property of the defendant, one dated May 1, 1877, to secure bonds amounting to $250,000, maturing in installments of $50,000 each, due May 1st, in the years 1879 to 1883, inclusive, and the other to secure bonds to the amount of $2,600,000, payable July 1, 1907, bearing interest after July 1, 1882,

at 8 per cent. per annum, and having interest coupons attached. The bill further alleges that the aggregate amount of the bonds
231 secured by said mortgage exceeds the salable values of the property and franchises of the defendant, or at least greatly exceeds the sum for which the same would sell under the hammer, and complainant believes that no bidder could be found at more than nominal amounts for said property, by reason of the existence of said mortgages, and a large part of the debt secured by the first mortgage being due and unpaid, it is alleged that the trustees in the mortgage could and would prevent the sale under execution of any part of said property if plaintiff should attempt to enforce payment of his judgment by execution, and therefore to sue out an execution would be to incur useless expense; that if said property is kept together and operated it will produce a large income sufficient to pay operating expenses and a large surplus each year. The de-
232 fendant has hitherto failed to apply its surplus income to the payment of complainant's debt, and unless prevented it will continue so to refuse, &c.

3rd. Soon after his appointment the receiver filed in said chancery court an inventory of the property turned over to him by virtue of his office.

4th. October 14, 1882, John L. Farwell filed petition to be made a party defendant, alleging that he is a stockholder of defendant, owning 17½ shares of the capital stock, and presenting an answer and cross-bill, alleging that the plaintiff's judgement was confessed by defendant company for no other purpose than as a preliminary step to the application to the court for a receiver, in order to hinder the prosecution of a certain suit by R. H. Dow, Watson Matthews, and Charles Moran therefor, instituted in the circuit court of the United States to enforce a claim against the railroad for about $250,000, and to enable plaintiff and others interested with
233 him to depreciate the market value of the bonds issued by defendant and to depreciate the stock. It is alleged that the suit is a sham and a mere financial expedient, with no other object than to make a successful speculation in the stock and securities of the railroad company; that there is not antagonism, either of feeling or interest, between the plaintiff and defendant, but they have caused this suit to be brought and maintained in collusion with each other for a common purpose, &c., and numerous other allegations of like tenor and effect.

5th. November 1, 1882, the receiver reported to the chancery court that since his appointment he had received $326,049.76 and paid out $283,943.73, leaving balance on hand, $42,106.03; also that the debts outstanding for labor, materials, supplies, &c., amounted to $62,000. He reports that he has expended the
234 money received for the benefit of the property, but nothing is said about the application of any part of it to the payment of plaintiff's judgments. He submits an engineer's statement showing that an expenditure of $570,605 is necessary to put the road in repair, and he adds that $100,000 more is required for rolling stock and motive power.

6th. November 10, 1882, cause removed to this court.

7th. After the removal and on the 9th of April, 1883, the receiver filed a report in this court asking for an appropriation of $631,930 for repairs, which sum he says is within the actual wants of the company, and he adds, "After spending the amount given in this statement we will only have the track, bridges, and wharf-boats, rolling stock, and motive power in a safe condition to operate. You will note no provision is made for raising the road-bed east
235 of Madison above high water, which, sooner or later, must be done to prevent the trade and traffic being stopped during the overflows of the Mississippi river and tributary streams."

8th. At the same time the receiver filed a statement showing that the earning of the road from June 25th to December 31, 1882, was $478,425.47, and that the expenditures for the same period amounted to $456,200.92, leaving as net earnings $22,224.55; also a statement for the month of February, 1883, showing receipts $173,449.60 and expenditures $102,898.63.

9th. The last report of the receiver, filed the same day, shows—

Cash on hand June 24, 1882, the date of his appointment	$31,957 76
Cash received from June 25, 1882, to March 31, 1883, inclusive	854,815 61
Total	$886,773 38
Expenditures	838,395 80
Balance on hand	$48,377 58

Cockrell, for complainants; B. C. Brown, for the railroad Co.; W. M. and G. B. Rose, for stockholders.

236 McCRARY, *Circuit Judge:*

The ostensible purpose of the complainant in applying for the appointment of a receiver in this case was to compel the defendant company to apply a part of its earings to the payment of his judgement. It now sufficiently appears that this was not the real purpose. The process of the court has not been used in good faith to collect complainant's judgement, but as a means of placing the property and business of the defendant railroad company in the hands of the court to be managed, through a receiver, to the end that the defendant may not be subject to suits in the ordinary course of judicial proceedings, and in order to enable the plaintiff and defendant by agreement between them, through the receiver, to apply all the earnings of the road during a series of years to the improvement and betterment of the property. In pursuance of this purpose
237 the receiver, during the period of about 9 months preceding his last report, had collected $886,773.38 and had expended $838,395.80 without applying a dollar toward the extinguishing of the complainant's judgement, and so far from proposing to pay the judgements or any part of it, he asks in his report of April 9, 1883, for an appropriation of $631,930 for repairs. It is also apparent

that this is not an adversary proceeding, but one in which the parties complainant and defendant have acted and are still acting in concert. The complainant judgement was rendered by consent, and on the same day the receiver was appointed without opposition, the defendant voluntarily appearing and waiving services of process. The receiver has acted in accordance with the wishes of both parties, and it is undoubtedly with the assent of complainant that he has made no effort to pay the judgement or any part of it out of the earnings of the road. In short, the complainant and defendant have
238 sought to make use of this court as an instrument to carry on through the hands of a receiver the important business of the defendant corporation, and this not for the purpose in good faith of enforcing the confessed judgment set out in the bill, but for the purpose of protecting the property of defendant from seizure upon legal process while the earnings are being applied to the improvements of the road. In other words, the court is asked to stand between the company and its creditors while the company is engaged in using its earnings, not to pay its debts, but to improve its property. It is said that this policy is best for the company and its creditors. Whether this be so or not is for the company and its creditors to determine; it is not for the court to engage in the operations of a railroad through a receiver because the interests of
239 the parties concerned may be thereby advanced. It does not appear that any suit has been commenced to foreclose either of the mortgages upon the road as to other and smaller debts. No good reason is seen why they should not be either paid or enforced by the ordinary judicial proceedings. As to complainants' judgment, it might have been paid in full from the earnings before this date if such had been the purpose of this proceeding and if complainants had insisted upon it. We cannot be expected to continue the receivership under such circumstances. The views of the court upon this subject are well expressed in the opinion of Caldwell, district judge, in the case of Overton, Trustee, *vs.* Memphis and Little Rock Railroad Co., as reorganized, 10th Federal Reports, 866, as follows:

Undoubtedly there are cases in which a court of equity may, through a receiver, take possession and control of the business of cor-
240 porations and individuals; but it is a jurisdiction to be sparingly exercised. None of the prerogatives of a court of equity have been pushed to such extremes as this, and there is none so likely to lead to abuses. It is not the province of a court of equity to take possession of the property and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding. If, as in this case, the loss or danger can be averted by the lawful action of the suitor or those he represents he cannot successfully invoke the exercise of the extraordinary powers of a court of equity because that course would be more agreeable or convenient.

241 The order will be that the receiver pass his accounts before the master, with a view to his final discharge at an early date.

After the preparation of the foregoing opinion and order, but before it was filed, the court was asked to hear and consider further argument and to delay action, which request was granted. Additional and very elaborate arguments were filed, but upon considering them we found nothing to change our views as above expressed. Before announcing our conclusion the writer of the opinion was presented with a written agreement, signed by counsel in the case, stipulating that the receiver should be discharged upon filing the receipts of the railroad company for the balance in his hands. An order of the character was signed, under the impression that all the parties in interest had consented thereto. This impression
242 may have been correct, but it is insisted by certain parties, who claim the right to be heard, that they did not consent, and that they now desire to be heard & object. They are understood to be judgment creditors who had applied for leave to intervene, and whose application was, and is still, pending.

Although those persons were not technically parties to the record, they have asked the right to be heard upon their application to intervene, and when that application, formally passed upon before the receiver, should be discharged in any irregular or unusual way; and it may well be that the counsel should hear their objection to this mode of discharge upon the ground that they have an interest in this question as judgement creditors of the defendant.

243 At all events it would be improper, while these persons thus situated are objecting, to relieve the receiver from the duty of passing his accounts before the master. The court can adhere to the order signed as above stated only upon being clearly satisfied that it was in accordance with the desire of all who have by — even the subject interest in the matter. That order will, therefore, be set aside, and the court, of its own motion, and not acting upon the stipulation of counsel, admits that the order be as directed in the foregoing opinion, to wit, accounts before the master with a view to his discharge at an early day. The court adds: That counsel have acted in good faith in promoting the agreement and in representing that it was signed by counsel for all the parties. That is strictly
244 true. The order was signed under the impression that the application for leave to intervene by certain preferred creditors had been overruled and was, therefore, not then pending.

Dec'r, 1883.

GEO. M. McCRARY,
Circuit Judge.

245 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office.

In witness whereof I have hereunto set my hand and the seal of said court this 14th day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and ninth.

Attest:

[The Seal of the Circuit Court, Arkansas District, U. S. A.]

RALPH L. GOODRICH, *Clerk*,
By D. P. FIELD, *D. C.*

Endorsed on cover: E. Arkansas C. C. U. S. No. 126. Russell Sage, appellant, *vs.* The Memphis & Little Rock Railroad Company (as reorganized). No. 127. The Memphis & Little Rock Railroad Company (as reorganized), appellant, *vs.* Russell Sage. Filed 18th October, 1884.

125-361

125-361

ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 126.

RUSSELL SAGE, APPELLANT,

vs.

THE MEMPHIS & LITTLE ROCK R. R. CO.

No. 127.

THE MEMPHIS & LITTLE ROCK R. R. CO., APPELLANT,

vs.

RUSSELL SAGE.

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1 *Claim and Intervention of Dow et al., Trustees.*

In the United States Circuit Court for the Eastern District of Arkansas.

RUSSELL SAGE, Plaintiff,

v.

MEMPHIS AND LITTLE ROCK RAILROD COMPANY, as Reorganized, Defendants.

Come R. K. Dow and Watson Matthews and ask leave to intervene herein and show as follows:

On the 1st day of May, 1877, the defendant executed to said Dow and Matthews and William S. Pierson, who has since died, its mortgage of that date, by which it conveyed to them and to the survivor or survivors of them, as joint tenants, and not as tenants in common, all and singular its charter, granted by the acts of Assembly of the State of Arkansas aforesaid, with all its rights, powers, privileges, immunities, and franchises, and also all and singular its railroad and right of way and easements from the west bank of the Mississippi, in or near Hopefield, in Crittenden county, Arkansas, to Little Rock, in Pulaski county, Arkansas, the connections of the said railroad with the Little Rock and Fort Smith railway and the St. Louis, Iron Mountain and Southern railway, its tracks, rails, ties, inclines, trestles, depots, rights of way, leases, easements, and privileges in the city of Memphis, in the State of Tennessee, all rails, trestles, ties, tracks, side tracks, switches, bridges, depots, stations, buildings, water tanks, machine shops, car houses, engine houses, warehouses, workshops, superstructures, engines, cars, wagons, machinery, tools, boats, wharf-boats, inclines, oil, fuel, supplies, and equipments that the said defendant owned or might hereafter acquire in the States of Arkansas or Tennessee or elsewhere, and also all and singu-

2 lar all lands, real estate, property of every kind, real, personal, or mixed, all books of account, records, muniments, and evidences of title, and choses in action which said defendant then owned or might hereafter acquire, wherever situate, and also all the incomes, rents, issues, tolls, profits, receipts, rights, benefits, and advantages had, received, or derived by the said defendant from any of the hereby conveyed premises; to have and to hold unto the said Dow, Matthews, and Pierson and to the survivor or survivors of them, as joint tenants, and to their assigns forever.

Said conveyance was made by said defendant for the purpose of securing the payment of certain bonds made by it, bearing even date with said mortgage, for the aggregate sum of $250,000, payable five years from that time, and bearing interest at the rate of ten per cent. per annum; all of which will be more fully seen by reference to a copy of said mortgage herein filed, marked "Exhibit A," and made part hereof.

No part of said money mentioned in said bonds has been paid.

The time for the payment of a few of said bonds has been extended by agreement with the holders thereof, but they are all now due except about $50,000, which will mature in the month of May, 1884.

Petitioners say that said mortgage was duly recorded immediately after its execution, and that, with the exception of a decree rendered in this court in favor of said Dow and Matthews and Charles Moran against the said railroad company in the year 1883, now superseded on an appeal pending in the Supreme Court of the United States, said mortgage constitutes the first lien on the property thereby conveyed. No part of the principal of the said bonds has been paid, nor has any of the interest which has accrued thereon since the 1st day of January, 1882.

3 Wherefore your petitioners pray that the court may direct the moneys remaining in the hands of the receiver to be paid on said bonds, and for all other proper relief.

H. M. & G. B. ROSE, *Solicitors.*

(Endorsed:) Filed Feb. 23rd, 1884. Ralph L. Goodrich, clerk.

The exhibit referred to in the above intervention will be found copied on page 187 of the record previously filed.

4 *Intervention of Dow, Matthews, and Moran.*

In the United States Circuit Court for the Eastern District of Arkansas. In Equity.

RUSSELL SAGE, Plaintiff,

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized, Defendants.

Come R. K. Dow, Watson Matthews, and Charles Moran, and show to the court that on the 2nd day of May, 1877, the defendant executed its second mortgage or deed of trust to William S. Pierson and said Dow and Matthews, reciting the issue of bonds by it of that date, amounting in the aggregate to the sum of twenty-six hundred thousand dollars, for the purpose of raising money for the construction and equipment of said railroad, and conveying to said Pierson, Dow, and Matthews, as trustees herein named, and their successor or successors, and his survivor or survivors, and assigns forever, all and singular the railroad and rights of way from the west bank of the Mississippi river, in or near Hopefield, in the county of Crittenden and State of Arkansas, to Little Rock, in the county of Pulaski and State Arkansas, with the connections of the said railroad with the Cairo and Fulton railroad and the Little Rock and Fort Smith railroad, and any railroad depots or rights of way in the city of Memphis, State of Tennessee, belonging to said railroad company, and all rails, trestles, ties, tracks, side tracks, switches, depots, stations, build-

ings, water tanks, machine shops, car houses, engine houses, warehouses, workshops, superstructures, engines, cars, wagons, machinery, tools, boats, wharf-boats, inclines, oil, fuel, supplies, and equipments which said defendant then owned or might thereafter acquire or become entitled to in the States of Arkansas
5 and Tennessee or elsewhere, pertaining to the main line of said road from Memphis to Little Rock; and also all and singular all lands, real estate, property of every kind, real, personal, and mixed, books of account, records, muniments, and evidences of title, and choses in action which were then owned or might thereafter be acquired by said defendant; and also the charters, franchises, rights, privileges, and immunities, including the right of franchise to be a corporation, which the said defendant then possessed or owned or which it might thereafter own or acquire in the States of Arkansas and Tennessee or elsewhere; and also all the rents, income, issues, tolls, profits, receipts, moneys, rights, benefits, and advantages had, received, or derived by the said defendant from its railroad or other property or in any other way whatsoever; to have and to hold the same unto the said Dow, Pierson, and Matthews, as trustees as aforesaid, and unto their successor or successors, survivor or survivors, and assigns forever, conditioned that the said conveyance shall be void in case said bonds should be paid according to their tenor or effect; and it was further stipulated therein that said trustees might appoint and employ, at the expense of the said trust estate, all such attorneys, counselors, agents, clerks, cashiers, book-keepers, engineers, and other agents as might reasonably be necessary to the execution of any of said trusts, and that they might fix their compensation; providing, further, that said defendant should from time to time, as incurred, pay all charges, costs, expenses, and compensation of said trustees and their successors and survivors in and about or for the execution of said trust, and that it should in all things keep said trustees or their successors fully indemnified and saved harmless of, from, and against all costs, damages, charges, and expenses which said trustees or their successors might sustain or be put to in consequence of accepting said trust or of anything that might be done or omitted to be done under it, saving only such damages as might arise from any
6 culpable act or neglect of said trustees; all of which will be seen by reference to a copy of said mortgage herewith filed, marked Exhibit C, and made part hereof.

Said mortgage was duly filed and recorded in the recorders' offices of the various counties in which said property is situated.

Moreover, by said mortgage of May 2, 1877, it was further stipulated as follows:

"That so long as said party of the first part (meaning said defendant) shall not make payment in the payment of either principal or interest on any of the aforesaid bonds and coupons as the same may respectively become due and payable and shall faithfully perform the conditions and stipulations of this indenture said party of the first part shall be entitled to retain the possession of the railroad

and other property hereby conveyed and receive and enjoy the income thereof."

Said Pierson having afterwards died, F. H. Cossitt, Henry Talmage, Peter Geddes, Alfred Sully, your orator, Dow, and John L. Farwell filed their bill on the chancery side of this court against the defendant herein, showing that they were severally owners of bonds secured by said mortgage of May 2, 1877, and that said Pierson had departed this life and praying that a successor might be appointed in his place; to which suit the defendant entered its appearance, and on the 5th day of October, 1880, by consent of parties, a final decree was rendered in said cause on the petition of more than one-third of the holders of the bond, secured by said last-named mortgage in value then outstanding, by which it was considered that your orator, said Moran, should be, and was, appointed a trustee under said mortgage in lieu of said William S. Pierson; that Moran has since accepted said trust and is now acting as such trustee.

Said defendant, with the intention of defrauding the holders of said bonds and coupons, has refused, under the false pretences aforesaid, that said bonds and mortgage were procured by fraud
7 and illegal and without consideration, to pay the said coupons falling due July 1, 1882, and all that have matured since that time, and they now remain wholly unpaid.

The said Dow, Matthews, and Moran further say that this suit was brought by collusion between said plaintiff and said defendant for the fraudulent purpose of hindering and delaying the collection of the debts of the defendant.

They therefore intervene herein and pray that if said fund now in court in this cause is not paid out on the claim and intervention of said Dow and Matthews already on file herein it may be paid in discharge of overdue interest on said bonds of defendant dated May 2, 1877, and for all other proper relief.

U. M. & G. B. ROSE, *Solicitors.*

(Endorsed:) Filed April 15th, 1884. Ralph L. Goodrich, clerk.

The exhibit referred to in the above intervention will be found copied on page 194 of the record previously filed.

8 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas begun and holden on Monday, the 22nd day of October, anno Domini one thousand eight hundred and eighty-three, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on February 12th, 1884:

RUSSELL SAGE

v.

MEMPHIS AND RITTLE ROCK RAILROAD COMPANY, as Reorganized.

On this day came the complainant, by S. R. Cockrill, Esq., his solicitor, and the defendant, by B. C. Brown, Esq., its solicitor, and E. K. Sibley, the receiver in this cause, in his own proper person, and said receiver files in court here his report and accounts of his administration of the property in his hands, from which it appears that there are a few unsettled accounts for traffic balances due to and from him, being claims which he has been unable to adjust, and thereupon, the defendant in open court assuming to pay all such balances due from said receiver, it is by consent of parties ordered that said receiver transfer all such balances to defendant and defendant receive and retain the same for its own use; and thereupon complainant files his motion and petition praying that the receiver, out of the funds in his hands, pay his, complainant's, judgment in the bill mentioned, and defendant files its motion to strike from the files sundry claims and motions filed by parties claiming to be creditors of defendant, and also its motion that after the payment of the amount due complainant all sums of money left in hands of the receiver be paid to defendant and Ira S. Colby, W. G. Wheeler, F. K. Cossitt, E. W. Barnes, W. B. Miller, Henry Talmadge, W. G.
9 Wheeler, M. C. Dodge, W. P. Miller, John L. Farwell, Geo. E. Dodge, Wm. C. Clark, R. K. Dow, Wm. A. Goodwin, M. L. Dow, E. C. Stokes, M. C. Dodge, Wm. M. Chamberlain, E. H. Bailey, E. W. Barnes, E. C. Stokes, H. M. Juillard, H. M. Juillard, Wm. Breck, Wm.Breck, and file amendments to their claims of intervention herein.

And on February 14th, 1884,—

RUSELL SAGE

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.

On this day comes the complainant, by S. R. Cockrill, its counsel, and also come H. Sanford, E. W. Barnes, John L. Farwell, M. L. Dow, F. H. Cossitt, Wm. Clark, R. K. Dow, Thos. Stokes, Wm. P. Miller, Geo. E. Dodge, G. T. Bonner & Co., Charles Moran, Henry Tamadge, W. B. Miller, W. G. Wheeler, M. C. Dodge, William Breck, H. M. Juillard, E. C. Stokes, John L. Farwell, A. D. Juillard. Amos R. Eno, Geo. Dow, H. E. Bailey, W. M. Chamberlain, Wm. A. Goodwin, Ira S. Colby, and E. W. Barnes, by U. M. and G. B. Rose, their counsel.

And the motion of defendant to strike out the claims made by the said H. Sanford and others coming on to be heard, was argued

by counsel, pending which argument the said Sanford and others amended their claim by adding the words following—that is to say:

"Claimant says that the bill filed in this suit and all the subsequent proceedings thereon have been simulated, collusive and fraudulent, and intended to cheat, hinder, and delay this claimant and others in like cases in the collection of their just debts, one of which is evidenced by said judgment in favor of this claimant, wherefore he prays that his said claim may be paid out of said fund in preference to all unsecured debts against said defendant," which amendment being made, the court overruled the said motion of defendant to strike out said claims.

And the court, not being sufficiently advised as to the matters of fraud and collusion alleged in and by such amendment to said claim, hereby refers said question to Charles P. Redmond, Esq., the master of this court, who is directed to allow complainant and defendant in this cause to make answer to the said claims and demands, to hear and take all testimony offered by said petitioning creditors and by complainant and defendant as to such allegations of fraud and collusion, and to report such testimony, together with his finding as to whether such alleged fraud and collusion between complainant and defendant existed or not; and it is further ordered that the time for taking such testimony be, and it is hereby, limited to sixty days from this date.

And the motions made by the complainant that the receiver be ordered to pay his judgment, and the motion by the defendant that the receiver be ordered to pay the residue of the money in his hands to it, and the claims of the said Sanford and other subsequent judgment creditors of defendant that the receiver be ordered to pay off their judgments are reserved until the coming in of said report.

And it is further ordered that the receiver, E. K. Sibley, pay all moneys in his hands into the Merchants' National Bank, a United States depository in Little Rock, or with the Assistant Treasurer of the United States at St. Louis or New York, whichever may be most convenient, to the credit and subject to the order of this court, and also that the said receiver is ordered to pass his accounts before the said master, who is to report whether any allowance should be made to the receiver for his services out of the funds in his hands, and, if any, what amount should be allowed him.

11 And it is further ordered that said master examine all the records, papers, and briefs of this cause, and of all the other cases pending in this court, within six months before the institution of this suit down to the present time in which the parties to this suit or either of them may be or have been parties, and he shall report the amounts and matters involved therein, and upon what such suits are based, the time of the bringing of said suits, and the defences interposed, and the final judgments and decrees in the same as far as the same may have been rendered, and whether appeals or writs of error have been taken, and also that he inquire and report as to what, if any, mortgages have been executed by defendant.

12 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas begun and holden on Monday, the 14th day of April, anno Domini one thousand eight hundred and eighty-four, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge presiding and holding said court, the following proceedings were had, to wit, on April 14th, 1884:

RUSSELL SAGE
v.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.

Comes the complainant, by S. R. Cockrill, Esq., his solicitor, and files herein a statement of complainant's claim.

And on April 15th, 1884, as follows:

RUSSELL SAGE
v.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.

Come R. K. Dow, Watson Matthews, and Charles Moran, by U. M. & G. B. Rose, Esqs., their solicitors, and by leave of court file herein their claim of intervention.

13 And on April 21st, 1884, as follows:

RUSSELL SAGE
v.
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.

Come the complainant, by his attorney, S. R. Cockrill, *his attorney*, and the defendant, by B. C. Brown, its attorney, and the interveners, by U. M. & G. B. Rose; and now the master herein having made report to the court that there is due to E. K. Sibley, receiver in this cause, four thousand one hundred and sixteen dollars and sixty-nine cents for his services herein, and there is due to B. C. Brown, Esq., as counsel for receiver, the sum of one thousand dollars, and that no objection was taken in the master's office to these allowances, and all parties consenting thereto, it is therefore ordered that the clerk draw his warrants upon the funds in the registry of this court in this cause, one to the order of E. K. Sibley, receiver, for four thousand one hundred and sixteen dollars and sixty-nine cents ($4,116.69) and one to the order of B. C. Brown for one thousand dollars ($1,000), and deliver the same to said Brown and Sibley, taking their receipts in duplicate therefor, one of which duplicate receipts the clerk will deliver to the master herein to be incorporated in his report in this cause.

And on May 22nd, 1884, as follows:

RUSSELL SAGE

v.

MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.

Comes Charles P. Redmond, Esq., master, and files herein his report.

14 *Exceptions to Master's Report by Ira Colby.*

In the United States Circuit Court for the Eastern District of Arkansas. In Equity.

RUSSELL SAGE

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.

Comes said Ira Colby and excepts to the report of the master herein because he says that the master should have found that he was entitled to the payment of his claim before the payment of any other demand against the fund herein.

U. M. & G. B. ROSE, *Solicitors.*

(Endorsed:) Filed May 24th, 1884. Ralph L. Goodrich, clerk.

15 And on May 24th, 1884, as follows:

RUSSELL SAGE

v.

MEMPHIS AND LITTLE ROCK RAILROD COMPANY, &c.

Come R. K. Dow, Watson Matthews, and Charles Moran, W. A. Goodwin, Charles Moran, G. T. Bonner, Thomas Stokes, Simon Borg, Amos R. Eno, Wm. Breck, Geo. N. Farwell, H. N. Sheldon, S. Levy, Henry Sanford, Ira Colby, Henry N. Sheldon, R. K. Dow, Wm. Clarke, Wm. Breck, F. M. Barnes, H. M. Juillard, E. C. Stokes, May C. Dodge, A. D. Juillard, Farwell, F. H. Cossitt, Wm. M. Chamberlain, and Martha L. Dow, by U. M. & G. B. Rose, Esqs., their solicitors, and file herein their exceptions to report of master.

And on June 25th, 1884, as follows:

RUSSELL SAGE

v.

MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.

Come the complainant, by S. R. Cockrill, his solicitor; the defendant, by B. C. Brown, its solicitor, and the interveners, by U. M. & G. B. Rose, their solicitors, and, by agreement of counsel, it is ordered that the exceptions to the master's report herein be submitted to the court, with leave to parties to file briefs by August 1st, 1884.

16 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas begun and holden on Monday, the 14th day of April, anno Domini one thousand eight hundred and eighty-four, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on the 8th day of August, 1884:

RUSSELL SAGE
v. } 512.
MEMPHIS AND LITTLE ROCK RAILROAD, as Reorganized.

Now on this day came said parties, by their respective solicitors, and also came the said Amos R. Eno, Henry Talmadge, Ira Colby, W. B. Wheeler, H. Sanford, A. W. Barnes, Thomas Stokes, R. K. Dow, William Clark, G. T. Bonner, Charles Moran, E. C. Stokes, William M. Chamberlain, H. M. Juilliard, H. E. Bailey, M. C. Dodge, M. L. Dodge, William Goodwyn, W. G. Wheeler, George E. Dodge, George Dow, John L. Farwell, W. P. Miller, F. H. Cossitt, William Breck, and A. D. Juilliard, by their solicitors, and the claims and interventions of * * * said last-named parties being now submitted to the court, the court is of the opinion that, in the face of their interventions, they are not equitably entitled to any part of the fund in court; and wherefore it is now ordered and decreed that the exceptions of said intervenors to the report of the master herein be, and the same is, overruled; that said interventions be dismissed for want of equity; that said intervenors pay all the costs of their several interventions herein; and thereupon said Amos R. Eno, Henry Talmadge, Ira S. Colby, W. B. Miller, H. Sanford, Charles Moran, E. C. Stokes, William M. Chamberlain, H. M. Juilliard, H. E. Bailey, M. C. Dodge, M. L. Dodge, William Goodwyn, W. C. Wheeler, George E. Dodge, George Dow, John T. Farwell, and W. P. Miller pray an appeal from this decree to the Supreme Court of the United States, which is granted.

17 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of Arkansas, Greeting:

[Seal of the Supreme Court of the United States.]

Whereas in a certain suit in said circuit court between Russell Sage, complainant, and the Memphis and Little Rock Railroad Company (as reorganized), defendant, which suit was removed to the Supreme Court of the United States by virtue of appeals agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings in said cause has been suggested, to wit:

"There has been omitted from the transcript in this case certain records which are now in the court below, and which are necessary to a proper understanding of this case, to wit:

"First. Two claims and interventions and exhibits filed by the said trustees in the court below.

"Second. Opinions delivered by the judges in the court below.

"Third. Exceptions to the report of the master.

"Fourth. Various orders and decrees entered during the progress of the suit."

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

18 Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the 15th day of November, A. D. 1887.

JAMES H. McKENNEY,
Clerk Supreme Court of the United States.

19 UNITED STATES OF AMERICA,
Eastern District of Arkansas, W. D.:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, western division, in the eighth circuit *circuit*, hereby return on the within writ, to me directed, that in obedience thereto I hereto append correct copies of records and proceedings in the cause named therein which now remain in said circuit court, the same being made a part of this return.

In witness whereof I have hereunto set my hand and the seal of said court this 18th day of November, A. D. 1887, and of the Independence of the United States of America the one hundred and twelfth.

(The Seal of the Circuit Court of East. Dist. Ark.,)
(Western Division, U. S. A.)

Attest: RALPH L. GOODRICH, *Clerk.*

Fees, $6.35; paid by Dow *et al.*, trustees.

20 [Endorsed:] Sup. Court U.S. 1887, Oct'r term. Nos. 126 & 127. Russell Sage, app't, *vs.* The Memphis & Little Rock R. R. Co., and The Memphis and Little Rock R. R. Co., app't, *vs.* Russell Sage. Writ of certiorari & return.

[Stamped:] Office Supreme Court U. S. Filed Nov. 22, 1887. James H. McKenney, clerk.

125-361

Burgoyne Quick Printing Co., cor. Centre and Walker, N Y

IN THE

Supreme Court of the United States.

RUSSELL SAGE, Appellant, AGAINST MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.	No. 126.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized, Appellants, AGAINST RUSSELL SAGE.	No. 127.

Brief in Behalf of Appellants against Intervening Trustees and Judgment Creditors.

NOTE. After argument of these causes the Court, on the application of counsel for intervenors, gave him leave to file a supplemental brief, but reserved in behalf of counsel for appellants the right to file a supplemental brief in reply. This brief is filed in the exercise of that right.

I.

The citation which Judge Rose makes from the Constitution of Arkansas conclusively discloses that but for the receivership in this cause it would have been fully within the power of Dow and of those who, under his advice, reduced their coupon debts to judgment, to seize and sell the rolling stock and other property.

Nothing could be more clear or well authenticated than is this purpose, as it is disclosed by the record and as it was understood by the Court.

Record, pp. 22–23 ; 49, 53 ; 177–178.

That this purpose was entertained and carried as far as practicable in the face of continuing offers of compromise is shown by Mr. Sage's explanation of his own forbearance.

Record, p. 110, x-Q. 152 and answer.

As was remarked in argument, this case presents from first to last a distinct and express repudiation on the part of these trustees of the very right which they are now seeking as intervenors to assert.

II.

To a correct appreciation of their course in this regard, it needs to be distinctly kept in view :

1. That the coupon holders who preferred wasting the property by seizure under execution to enforcing their mortgage rights, found motive for their choice in the belief that the Missouri Pacific Railway Company would carry the Memphis and Little Rock at a large annual loss, rather than lose, as they supposed that otherwise it must do, its connection at Memphis with the Mississippi and with Eastern railroads.

2. To a correct appreciation of Mr. Dow's motive in persistently urging these bondholders to this course, it is only necessary to refer to the very large compensation awarded to him as trustee in the various branches of the case, although further explanation lies not far outside the record. The records of other cases in this Court show that he and his co-trustees have received the following aside from what was paid him for managing the railroad for more than two years as trustee.

In case of Memphis & Little Rock Railroad Co. as reorganized vs. Dow *et al.*, No. 40 on Docket of October Term, 1886, at p. 314 of the Record in that case, Dow received.....	$12,500 00
Matthews received.....	1,000 00
In case similarly entitled, cross-appeals numbered 115 and 164 on present Docket, at p. 17 of the Record. In that case Dow & Matthews received.....	12,500 00
In the New York suit similarly entitled, No. 452 on the present Docket, the Master's report, which was confirmed by the Circuit Court and is contained in the	

Record, allowed Dow, Matthews and Moran the sum of.....	$45,000 00

In case similarly entitled, cross-appeals numbered 125 and 165 on the present Docket, it appears (p. 47 of the Record) that a reference was ordered to Chas. P. Redmond, Esq., as Master, "to ascertain the proper amounts to be allowed to said plaintiffs (Dow *et al.*) and their solicitors," and though his report is not contained in the Record, sent up, from the amplitude of the allowances made in the above cases, we are led to conclude that the trustees were provided for with like generosity.

These amounts are exclusive of attorney's and counsel fees allowed in such cases out of the fund in Court, and which amounted to about $15,000, in Nos. 115 and 164, and $20,000 in No. 452.

III.

To affirm the decree of the Court below is to violate an established and necessary rule of equity by which the marshaling of liens has always been controlled.

The law on this point is laid down very concisely

and forcibly by Story in his work on Equity Jurisprudence, § 633, as follows:

"The general principle is, that, if one party has a lien on, or interest in two funds, for a debt, and another party has a lien on or interest in one only of the funds, for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, wherever it will not trench upon the rights or operate to the prejudice of the party entitled to the double fund."

Citing the following cases:

Lanoy vs. Duke of Athol, 2 Atk., 446.
Aldrich vs. Cooper, 8 Ves., 388.
Ex parte Kendall, 17 Ves., 520.
Trimmer vs. Bayne, 9 Ves., 209.
Cheeseborough vs. Millard, 1 Johns. Ch., 413.
Averall vs. Wade, Ll. & Goold, 252.
Gwynne vs. Edward, 2 Russ., 289.
Cradock vs. Piper, 15 Sim., 301.
Att. Gen. vs. Tyndal, Ambler, 614.
Selby vs. Selby, 4 Russ, 336.
Greenwood vs. Taylor, 1 Russ. & Mylne, 185.
Wiggin vs. Darr, 3 Sumner, 410, 414.

"It is the ordinary case (says Lord ELDON) to say a person having two funds shall not by his election disappoint the party having only one fund, and equity to satisfy both will throw him who has two funds upon that which can be affected by him only, to the intent that the only fund to which the other has access may remain clear to him."

Aldrich vs. Cooper, 8 Vesey, 382, 395.

In this case the fund was earnings collected by the diligence of Mr. Sage, not only this, but earnings which if Mr. Dow had had his way would not have been made at all. The property being covered by two mortgages Sage could get nothing from the corpus until both had

been satisfied in full from the proceeds of any sale. As to the earnings, however, the case is different. His right to those is disclosed by the positions taken in the principal brief. If these trustees have any right whatever to these earnings it is a right which exists in behalf of a debt which is also secured by a first lien upon the corpus. If they have such a right, therefore, they have a lien upon two funds, the earnings and the corpus, while Sage has a lien only upon one fund, the earnings. By this fund they are abundantly secured, for it is the trustees of the *preference* mortgage to whom this fund was turned over. This mortgage is for $250,000 only, and is a first lien upon the whole property of the company.

IV.

In reply to the question asked by the Chief-Justice with reference to the transcript from the books of the Missuri Pacific, printed on page 122 of the Record.

I may be permitted to say that Mr. A. H. Calef, the treasurer of the company, on his examination as a witness in the cause, produced in evidence a transcript from the Mo. Pac. Co.'s Ledger (see Record, p. 122), showing the account of the M. & L. R. with the Mo. Pac. Co., upon the debit side of which appear entries "To Cr." so much—the amount carried out; and upon the credit side "By C." so much, and "By J." so much.

Mr. Calef states that in this account "C." means "Cash Book" and "J." "Journal," indicating that the particular entries have been transferred from either of those books. So far as the mere Ledger account itself is concerned, he says that there is nothing to show whether the respective amounts charged or credited were *actually* money or its value. He refers, in explanation, to his testimony, at pp. 113–117 and 121, showing that *money* was advanced to the M. & L. R. Co., with which it is charged in the account; and that the amounts with which the M. & L. R. Co. is credited represent the face value of the *coupons* turned over to the Mo. Pac. Co. by the Trust Company, and that so far as this account is concerned, no *money* was ever paid by the M. & L. R. Co. to the Mo. Pac. Co.

WAGER SWAYNE,
For Appellants.

Jan. 18, '88.—60.

155-361

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 126.

RUSSELL SAGE, APPELLANT,

against

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized).

No. 127.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), APPELLANT,

against

RUSSELL SAGE.

BRIEF FOR APPELLANTS AGAINST INTERVENING TRUSTEES AND JUDGMENT CREDITORS.

WAGER SWAYNE,
For Appellants.

Judd & Detweiler, Printers.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 126.

RUSSELL SAGE, APPELLANT,

against

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized).

No. 127.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), APPELLANT,

against

RUSSELL SAGE.

STATEMENT.

The Memphis and Little Rock Railway Company was the owner of a railroad extending from Little Rock, Arkansas, to the Mississippi river, opposite Memphis, Tennessee.

Its property was subject to two mortgages, one dated May 1, 1877, for $250,000, with interest at ten per cent., and known as the preference mortgage, and one dated May

2, 1877, for $2,600,000, bearing interest at eight per cent., and known as the general mortgage. Interest in each case was payable semi-annually.

See Record, pp. 154–168.

For some time prior to January 1, 1882, it had applied its earnings to payment of mortgage interest to the exclusion of renewals and repairs until its railroad had become dilapidated and dangerous.

Indispensable repairs made it impossible to reserve from its gross earnings money with which to pay another installment of interest maturing on that day. This payment was, therefore, made with money borrowed from the Missouri Pacific Railway Company.

The next installment of interest, maturing July 1, 1882, the Memphis and Little Rock Railroad Company was also without money to pay, while its railroad had meantime been devastated by a flood.

At this juncture Robert K. Dow, the active and managing trustee of both the company's mortgages, notified the company's counsel that if the company should default on its interest due July 1 no suit for foreclosure would be brought, but that actions at law would be commenced upon the coupons then defaulted, as many actions as the amount required for jurisdiction in the United States circuit court would permit, and the company's property would be levied on under executions when judgment was obtained. (Affidavit of B. C. Brown, Record, pp. 21–23; affidavit of F. A. Marquand, Record, pp. 16–17.) More than forty such suits were afterwards begun and prosecuted, one of them having been commenced by an attachment of the company's ticket balances and current funds in Memphis within one week after the default.

The stock of the Memphis and Little Rock Railroad Company was virtually all held by Jay Gould, Russell Sage, and Henry G. Marquand, trustees for the St. Louis, Iron Mount-

ain and Southern Railway Company. The stock of that company in turn was owned by the Missouri Pacific Railway Company, the same which had loaned to the Memphis and Little Railroad Company the money to pay interest due January 1, 1882. (Record, p. 50.)

Under these circumstances, and with this default approaching, the Memphis and Little Rock Railroad Company, June 20, 1882, made a demand note for $115,494.03, and delivered the same to the Missouri Pacific Railway Company in payment of the amount borrowed to pay the last installment of interest. This note, on the same day, the Missouri Pacific Railway Company sold to Russell Sage, the plaintiff in error. (Record, p. 130.) Four days later, June 24, 1882, judgment was taken on this note in the circuit court of the United States for the eastern district of Arkansas, the company consenting by its counsel. The judgment was for $125,921.13, the difference being the balance due on another note of the Memphis and Little Rock Railroad Company, which had been for several months in the hands of Mr. Sage, overdue and unpaid. (Record, p. 55.)

A bill was at once filed by Sage in the chancery court of Pulaski county, Arkansas, setting up this judgment, alleging the existence of the mortgages and his consequent inability to collect by execution at law, and praying that a receiver be appointed, who should operate the railroad and apply any surplus to the payment of his judgment. The Memphis and Little Rock Railroad Company was the only party made defendant. It offered no objection to the appointment of a receiver, and its own general manager was immediately appointed.

October 14th, 1882, one Farwell intervened. He claimed to own seventeen and one-half shares of stock, but beyond filing his petition he took no active measures.

Record, pp. 8–11.

Dow also intervened, November 10, 1882, not as trustee or bondholder, but only as claiming to hold twenty-one and one-fourth shares of stock.

Record, pp. 24–26.

On the same day, November 10, 1882, the cause was removed to the United States court, the company petitioning and filing the requisite bond, and Dow and Farwell doing the same thing.

Record, pp. 27–29.

December 1, 1883, seventeen months after the receiver was appointed, Dow again, this time with thirty-six others, applied for leave to intervene. (Record, p. 29.) Each of them held a judgment against the company, rendered upon some of the defaulted coupons due July 1, 1882. (Record, pp. 173, 174.) The aggregate amount of these judgments, with interest, was about $200,000. (Record, p. 46.) Each of them claimed that the receivership was a collusive proceeding to hinder and delay creditors, and asked that the Sage judgment be set aside and the petitioner's judgment paid from the earnings of the receivership, which, during the seventeen months of the receivership, amounted to $218,998.98.

Record, pp. 36, 37.

Instead of granting these applications, the court, December 3, 1883, filed an opinion denouncing the proceeding as collusive and directing the discharge of the receiver.

Record, pp. 175–179.

An order was thereupon entered that the receiver turn over to the company its railroad and all other property in his hands except net earnings, the railroad company expressly assuming, by a stipulation in the order, all the liabilities of the receiver.

Record, p. 30.

February 12, 1884, Sage filed his motion that the receiver be ordered to pay his judgment out of the net earnings in his hands.

The railroad company on the same day moved to strike from the files the intervening petitions of Dow and the thirty-six others intervening as judgment creditors.

Record, pp. 31, 32.

February 14, 1884, Dow and these other judgment creditors amended their petitions, amplifying their averments of fraud and collusion by Sage and the company.

Record, pp. 31, 32.

On the same day the net earnings of the receivership, amounting to $218,998.98, were thereupon directed to be paid into the registry of the court.

Record, p. 32.

On the same day the cause was referred to a master, to report fully upon every feature of the case.

May 19, 1884, the master filed his report. He found, among other matters of fact, that Dow acted, as above stated, for himself and associate trustees substantially as if he were sole trustee of both mortgages; that he did threaten, in advance of the default of July 1, 1882, that if such default occurred no foreclosure would be instituted, but that as many suits at law would be begun as the jurisdiction of the United States courts would permit, and that such suits were actually brought. He also reported, without an express finding, the uncontradicted evidence of the treasurer of the Missouri Pacific Railway Company that the advances for which the note of the Memphis and Little Rock Company was given were really made and used in payment of coupons; but the proceedings by which this note was transferred to Sage he pronounced "a mere juggle" used to put into Sage's hands means to procure the appointment of a receiver, and that

the Memphis and Little Rock Company fraudulently and collusively aided him in procuring such appointment.

He also found as matter of fact that no effort was made by the trustees or any of them to interfere with or terminate the receivership, but that the earnings of the company were diverted from the payment of its debts and used for the improvement of its property.

He also reported the various judgments above referred to and the fact that they were rendered upon debts due for interest and evidenced by coupons, some of the preference and some of the general mortgage. Some of them were also for the principal of preference bonds already due.

Thereupon, denying as matter of law that these judgment creditors had by their action acquired any new right or claim, and concluding as matter of law that their rights and equities as coupon-holders continued unimpaired, he reported a recommendation to the court that, inasmuch as it was disclosed by these judgments that large sums were due and unpaid upon the preference mortgage, and holders of these coupons were in court and claiming the net earnings of the receivership, therefore the net earnings of the receivership should be turned over to the trustees of the preference mortgage for distribution *pro rata* among the holders of that mortgage.

See Report of Master, Record, pp. 48–62.

To this report exceptions were filed in behalf of Sage and of the railroad company covering all of the positions now taken in their behalf. These were all overruled, and June 25, 1884, a decree was entered directing the fund in court to be turned over to the trustees of the preference mortgage for distribution among their coupon-holders.

Record, p. 169.

From this decree Sage and the company both appealed, and it is those appeals which are now here for judgment.

Meantime the trustees of that mortgage, having commenced, June 26, 1883, a suit for foreclosure, had intervened in this suit February 23, 1884, and asked that the net earnings of the receivership in this suit, ended some weeks before, be turned over to themselves.

Record, p. 149.

Meantime, also, April 19, 1884, the trustees of the general mortgage, having just before, February 12th, brought suit, *not* for the foreclosure of that mortgage, but for possession as trustees, intervened in the cause, praying that the net earnings of the receivership in this cause be paid to themselves as trustees, *if the same were not applied to the payment of judgments rendered upon coupons.*

ASSIGNMENT OF ERRORS.

The court below erred—

1. In holding that complainant's judgment was not based upon a just and valid debt against defendant.

2. In holding that there was collusion between complainant and defendant for the purpose of hindering and delaying the creditors of the latter.

3. In holding that the creditors of defendant were hindered and delayed by complainant's action.

4. In holding that complainant's judgment was not entitled to be first paid out of the fund in court.

5. In decreeing the payment of the fund in court to the trustees of the preference mortgage.

ARGUMENT.

I.

NO CREDITOR OF THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY HAS ANY GROUND OF COMPLAINT IN THE TRANSFER TO SAGE OF THE DEBT DUE TO THE MISSOURI PACIFIC RAILWAY COMPANY.

There is and can be no question of the validity of the debt of the Missouri Pacific Railway Company. The terms upon which that company saw fit to transfer this debt to Mr. Sage, the degree of precaution or of laxity on either side, the facts of payment or the contrary—all these are of importance, not at all as throwing light upon the mere genuineness of the transfer of this debt from one owner to another who makes it the basis of proceedings at law, but only as they incidentally throw light upon the use intended to be made of the debt when thus transferred. If it were conceded on all sides that the transfer was a purely simulated action, whereby the Missouri Pacific was enabled to act in the name of Sage and in his guise, still the fact that the Missouri Pacific had just as good a right as Sage could have to take any steps whatever for the collection of this debt strips the circumstances of the transfer of all consequence except as they may throw light upon some purpose entertained by one or the other of these parties, of which, independent of the mere fact of the transfer of the debt, the defendant in error may stand here and complain.

Here it is at once seen that since there was nothing that Sage could do which the Missouri Pacific was not equally free to do, it is of no consequence by which of the two whatever was done was done and therefore the transfer itself with its attendant circumstances, whatever they may have been, are of no significance here. Sage has no right to the fund,

which the Missouri Pacific would not have if it had proceeded in his stead, and so long as it does not complain no one else can derive from that fact a right to complain.

II.

THE SAGE JUDGMENT WAS NOT USED TO HINDER OR DELAY ANY PROCEEDING WHATEVER UNDER EITHER OF THE TWO MORTGAGES. NOTHING WAS OR WAS MEANT TO BE HINDERED OR DELAYED BY THE PROCEEDING COMPLAINED OF, EXCEPT SEIZURE OF THE PROPERTY UNDER EXECUTION AT LAW INSTEAD OF BY ENFORCEMENT OF THE MORTGAGE LIENS UPON IT.

A brief study of the record will conclusively show that the utmost that can be said of the use made of the Sage judgment is that it was used to hinder and prevent coupon-holders from collecting the money due them in one way rather than another. There is no pretense that anything was ever done that was either designed or effective to hinder the enforcement of the mortgage or of any right secured by it. The Sage bill, setting up the judgment and praying for a receiver, describes both mortgages, expressly states that by their terms the trustees are authorized and empowered to take possession, and concludes with the statement that "Plaintiff alleges that he seeks said relief only subject to the rights and equities of the holders of said bonds or their trustees."

Neither the holders of the bonds or their trustees asserted either rights or equities as such until after the receivership was terminated. Instead they merged their coupons into judgments and came into court in that capacity, and even now are here in that capacity claiming this same fund. Among them are two of the trustees themselves. The record nowhere discloses that there were or are any other creditors of any class whatever.

A review of the record shows—

First. A threat by the managing trustee that in the event of default there should be no foreclosure, but that the coupons would be turned into judgments at law and the company's property seized under execution.

Second. The company gives its note for a valid debt due to the owner of virtually all of its share of capital. The note is immediately transferred to a person, who reduces it to judgment, the company consenting, and immediately procures the appointment of a receiver, the company consenting to that also. The bill recites the mortgages and prays relief, only subject to all rights and equities of the bondholders.

Third. One of the suits which were threatened is brought immediately after the default, and execution is levied upon the property of the company at Memphis, Tennessee, the only station where the company's property is outside the jurisdiction of the court. Thirty-seven other suits on coupons are reduced to judgment, but, the property being covered by the receivership, the threatened levies are not made.

Fourth. The court discontinues the receivership on the express ground that thus to forestall these executions at law was to unlawfully hinder and delay the creditors of the corporation.

III.

TO PROCURE A RECEIVER WITH THIS INTENTION AND EFFECT IS NOT WITHIN THE DEFINITION OF HINDERING AND DELAYING CREDITORS.

Considered from the stand-point of this inquiry, the case presents simply one creditor of a corporation asking a court of equity to take its property in hand to prevent multitudinous seizures. It may or may not be true that the corporation not only consented but helped him to get himself into

position as a judgment creditor to prefer this request; that does not make a case of helping one creditor to an unjust preference over others. The only others were those to whom he himself gave, so far as they preserved their then existing character as mortgagees, an express preference by the prayer of his own bill. If collusive at all the collusion extends merely to turning a just debt into judgment in order that the judgment might be used as a basis for relief in equity of such a character as hindered nothing except seizures under executions at law. If that be not unlawful in itself it is hard to see how any degree of collusion in aid of it can be.

An unlawful collusion must be to do an unlawful act. The act gives character to the transaction. Nor is the mere appointment of receiver and the consent thereto by the railway company, as here other than perfectly proper and commendatory.

Brassey *vs.* N. Y. & N. E. R. R. Co., 19 Fed. R., 663.
Union Trust Co. *vs.* Ill. Mid. Co., 117 U. S., 434.
Citing and commenting upon:
Wallace *vs.* Loomis, 97 U. S., 146, and
Miltenberger *vs.* Logansport R'y Co., 104 U. S., 286.
See also Long Dock Co. *vs.* Mallory, 12 N. J. Eq., 431.

In the *Brassey case* it was held that an insolvent railroad corporation may be put in the hands of a receiver whenever the welfare of the various interests requires it, *even though no default has actually been made* by the corporation in its obligations to the petitioner, but a default is imminent and manifest and the corporation is in danger of the breaking up and destruction of its business.

Says SHIPMAN, J., on page 669:

"This bill alleged the existence of the corporation and the first and second mortgage bonds and of the actual inability of the road to pay its interest, to become due on January 1st; the existence of the floating debt, and its inability to pay that; *the intention of some of the creditors to attach the mortgaged property; the peril of the road arising from*

anticipated attachments of the property covered by the second mortgage, and the loss of and breaking up of the business of the road from its inability to pay connecting lines, and its consequent inability to pay the interest due on February 1st; in brief, it alleged the insolvency of the road, *though not in terms*, and the danger and hazard of serious injury to the revenues of the company unless suits were prohibited and those who did business with it were assured that its current expenses were to be paid. These allegations are admitted, both by the corporation and by the trustees of the second mortgage. I am of the opinion that when a railroad corporation, with its well-known obligations to the public, has become entirely insolvent and unable to pay its secured debts, unable to pay its floating debt, and unable to pay the sums due its connecting lines; unable to borrow money, and in peril of the breaking up and destruction of its business, and confesses this inability, although no default has as yet taken place upon the securities owned by the orator, but a default is imminent and manifest, a case has arisen where, upon a bill for an injunction against attacks upon the mortgaged property and a receivership to protect the property of the corporation against peril, a temporary receiver may properly and wisely be appointed.

"It is next said that this was a case of collusion between the orator and the railroad corporation. * * * *If by collusion is meant that the preparation for an institution of the suit were known and desired by the directors or some of them in the belief that the granting of the prayer of the bill would be prudent and wise, then there was collusion.* * * * *The railroad company consented prior to coming into court to the appointment, as is frequently and properly the course in cases of this kind.*"

This Court has, moreover, given express sanction to the act of stockholders and creditors in such a case in putting the corporation itself into the hands of a receiver.

In Union Trust Co. *vs.* Illinois Midland Co., 117 U. S., 434, at page 459, the Court say:

"The coplaintiffs with Hervey were judgment creditors of the Paris and Decatur Company, with executions returned unsatisfied. The bill set out the precarious condi-

tion of all the property held and used by the Illinois Midland Company and the necessity for a receiver in the interest of all the creditors of all four of the corporations to prevent the levy of executions on such property; and it prayed for a judicial ascertainment and marshaling of all the debts of all the corporations and their payment and adjustment as the respective rights and interests of the creditors might appear, and for general relief. The plaintiffs set forth that they represented a majority of the stock in all the corporations. This bill was quite sufficient to enable a court of equity to administer the property and marshal the debts, including those due the mortgage bondholders, making proper parties before adjudging the merits."

IV.

THE SAGE JUDGMENT SHOULD HAVE BEEN PAID FROM THE NET EARNINGS OF THE RECEIVERSHIP.

It is quite true that the Sage bill prays relief only subject to all rights and equities of the holders of bonds secured by either of the two mortgages.

It is equally true, however, that the rights and equities to which he here defers are those arising from the mortgage liens as such. He certainly does not in his bill postpone his debt to any future judgment into which coupons may be merged or waive, as to such judgment, any legal right. Some holders of defaulted coupons afterwards abandoned their mortgage lien and resorted to their simple contract right. How completely they did this is shown by the fact that they are here now claiming the fund against the trustees of their own mortgage. The right they might otherwise have enjoyed through their trustees was to a distribution *pro rata*, the right they assert here is an exclusive right to payment irrespective of the mortgage debt—to its total exclusion, if need be. The two rights cannot coexist. To assert one is to denounce the other.

When these coupon-holders abandoned their lien and chose to exercise instead their simple contract rights, they

put their debts on an equality, in point of right, with that which was due to Sage, and at the same time made them inferior to his debt in point of time, inasmuch as his debt was already reduced to judgment.

Hence, as between the Sage judgment and the other judgments, the matter stands for decision on a basis of strict right, and no preference is accorded to them by the bill.

From this stand-point it seems clear that the Sage judgment is entitled to be paid from these net earnings gained during the receivership. It is true that the appointment of the receiver originally rested in the discretion of the court; that discretion extended, perhaps, equally to his discharge; the fund accumulated was, however, an actual result of the actual exercise of that discretion. The course to be pursued with that fund was not discretionary with the court. Involving, as it did, the payment of money, it affected a substantial right and was reviewable upon appeal.

Forgay *vs.* Conrad, 6th Howard, 201.
Thompson *vs.* Dean, 7th Wallace, 342.
Stovall *vs.* Banks, 10th Wallace, 583.
Whiting *vs.* Bank, 13th Peters, 15.
See 8th Equity Rule, U. S. Supreme Court.

And, if entitled to be paid at all out of this fund, Sage is entitled to be first paid in full before any other creditor is admitted to a share, because he who first files his bill is entitled to satisfaction of his lien prior to other claimants on the fund.

Beach, in his late work on Receivers, § 623, says:

"Furthermore, as between two creditors, upon general equity principles, the more diligent, or *he who first obtains a receiver*, is entitled to a priority in the distribution of the fund; so also *a priority will be given to the creditor who first obtains possession of or a lien upon the property of the debtor, irrespective of the date of the judgments.*"

See also the following cases on this point:

Parks *vs.* Sprinkle, 64 N. C., 637.
Corning *vs.* White, 2 Paige, 567.
U. S. Bank *vs.* Burke, 4 Blackf. Ind., 141.
Storm *vs.* Waddell, 2 Sandf. Ch., 308.
Edgell *vs.* Hayward, 3 Atkyns, 352.
Lynch *vs.* Johnson, 48 New York, 33.
Hills *vs.* Sherwood, 48 Cal., 393.
Puellis *vs.* Robinson, 73 Mo., 201.

See also dictum of Nelson, J., in—

Day *vs.* Washburn, 24 How., 255.
Wait on Fraud Conv., § 392.
2 Hoffman's Ch. Pr., 114.
Burt *vs.* Keyes, 1 Flipp, 72.
Douglass *vs.* Huston, 6 Ohio, 156.
Miers *vs.* Zanesville, &c., Co., 13 Ohio, 197.

Says Stevens, J., in U. S. Bank *vs.* Burke, 4 Blackford (Ind.), 141, 145:

"Such a bill, *the instant it is filed*, becomes a specific lien, and the creditor who first files his bill obtains a priority and preference over the other creditors as a reward of his diligence."

Citing—

Weed *vs.* Pierce, 9 Cow., 722.
Beck *vs.* Burdett, 1 Paige, 305.
Edmonston *vs.* Lyde, 1 Paige, 637.
Corning *vs.* White, 2 Paige, 567.
Edgell *vs.* Haywood, 3 Atk., 357.

Says Mr. Justice NELSON for this Court, in Day *vs.* Washburn, 24 How., 253, 255:

"The court of chancery does not give any specific lien to a creditor at large against his debtor further than he has

acquired at law; for as he did not trust the debtor on the faith of such a lien it would be unjust to give him a preference over other creditors and thus defeat a *pro rata* distribution, which equity favors, unless prevented by the rules of law. It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired which a court of chancery will enforce."

2 Johns. Ch., 283, 284; *ib.*, 691.

IT IS WELL-SETTLED LAW that the filing of the creditor's bill creates *eo instante* an equitable lien upon the fund sought to be reached.

Miller *vs.* Sherry, 2 Wall., 249.
George *vs.* Williamson, 26 Mo., 190.
Corning *vs.* White, 2 Paige, 567.
Lynch *vs.* Johnson, 48 N. Y., 33.
Brown *vs.* Nichols, 42 N. Y., 26.
U. S. Bank *vs.* Burke, 4 Blackf. (Ind.), 141.
Beck *vs.* Burdett, 1 Paige, 308.
Storm *vs.* Waddell, 2 Sandf. Ch., 494.
Edgell *vs.* Hayward, 3 Atk., 352.
Perego *vs.* Bonesteel, 5 Biss., 66.
Wait's Fraud Conv., § 68.

And the fact that Sage did not issue an execution before filing his bill does not impair his rights, because the vanity of such proceeding on his part is apparent from a consideration of the insolvent condition of the road at the time, together with the further facts set forth in his bill as reasons for his failure to make a levy at law; and, following the salutary maxim, "*Lex neminem cogit ad vána seu inutilia*," it is well settled that, where an execution can produce no result beneficial to the creditor levying, its return unsatisfied is not a prerequisite to a creditor's bill in equity.

Wright *vs.* Campbell, 27 Ark., 641.
Royer Wheel Co. *vs.* Fielding, 31 Hun., 277.
Buswell *vs.* Lincks, 8 Daly, 518.

IT IS CONTENDED NEXT that, notwithstanding the fact that the Sage bill was filed before any proceedings were taken by the other creditors against the railroad company, yet the receiver appointed at Sage's instance holds the property for all persons subsequently intervening in the suit, and that the *mere existence* of a receiver, therefore, *gives them rights* which they cannot otherwise, by any stretch of legal imagination, be deemed to possess. This is, however, fallacious upon its face and may be disposed of by the following proposition, viz:

THE APPOINTMENT OR EXISTENCE OF A RECEIVER CREATES NO RIGHTS, nor does it *in anywise* affect liens valid and subsisting at the time of his appointment, nor can it divest this lien which is dependent solely upon the filing of the bill, the prerequisites thereto having been complied with, nor can it rob Sage of the priority acquired by his diligence in filing his bill.

High on Receivers, § 5, and cases.
Beach on Receivers, § 1.

Says Beach in his late work on Receivers, § 1:

"The purpose of a receivership being to preserve the property contested for, *pendente lite, it has no effect of itself upon the title to such property, either to change it or to create a lien upon it. The appointment of a receiver determines no right as between the parties, nor does it affect the title to the property in any way.*"

In *Beverly* vs. *Brooke*, 4 *Gratt.*, 187, (208,) BALDWIN, J., thus defines the position of the court in appointing a receiver:

"In the exercise of this summary jurisdiction a court of equity reverses in a great measure its ordinary course of administering justice, beginning at the end and levying upon the property a kind of equitable execution, by which it makes a general instead of a specific appropriation of the issues and profits, and afterwards determining who is enti-

tled to the benefit of its *quasi* process; but acting, as it often must of necessity, before the merits of the cause have been fully developed, and not infrequently when the proper parties in interest are not all before the court, it proceeds with much caution and circumspection *in order to avoid disturbing unnecessarily or injuriously legal rights and equitable priorities.*"

Says High in his work "On Receivers," § 5:

"A receiver being appointed for the preservation of the fund or property *pendente lite*, and for its ultimate disposal according to the rights and priorities of the parties entitled, the remedy is regarded as in the nature of a sequestration rather than as an attachment of the property, and *it* ordinarily gives no advantage or priority to the person at whose instance the appointment is made over other parties in interest. (Beverly *vs.* Brooke, 4 Gratt., 157; Ellis *vs.* Boston, &c., R. Co., 107 Mass., 1.) Nor does it change the title to or create any lien upon the property, its purpose in this respect being rather like that of an injunction *pendente lite* to preserve the subject-matter until the rights of all parties may be judicially determined; and in the exercise of this branch of its extraordinary jurisdiction equity reverses the ordinary course of administering justice and levies upon the property a kind of equitable execution, by means of which it makes a general appropriation thereof, leaving the question of who may finally be entitled to be determined thereafter. It follows, therefore, from the peculiar nature of the remedy, as thus shown, as well as from the fact that the court must often act before the merits of the controversy have been fully developed and when the parties in interest are not all before the court, that it proceed with extreme caution in order to avoid any unnecessary disturbance of legal rights or equitable priorities."

The receiver being merely incidental to the effectuation of the lien *created by the filing of the bill*, and being merely a custodian appointed by the court to hold for it the fund in dispute, it is, we submit, absurd to say that the appointment of itself could confer any rights, divest any liens, or disturb any priorities among the claimants upon the fund. *The entire effect of the receivership is merely to hold the property pending the decision or effectuation of rights otherwise acquired by the parties.*

V.

NO VIEW OF THE CASE WILL SUPPORT THE ACTION OF THE COURT IN PAYING THIS FUND TO THE TRUSTEES OF THE PREFERENCE MORTGAGE.

The trustees, obviously, are here only as representatives of a trust. They have no rights except such as arise from the trust. The trust is created by a written instrument, and its terms are carefully defined. The one controlling feature of those terms is that the company shall have the earnings until the trustees take possession. The earnings they shall then take are subsequent earnings only. This is the law settled and well established. In the brief in the case heard with this (Nos. 125, 165) we have, as we conceive, established this point fully.

The receivership under the Sage bill was not a constructive possession by the trustees. In the preceding point this has been shown to be true as matter of law. As matter of fact also that proceeding was not only not adopted by them as trustees, but was distinctly repudiated and antagonized by them as stockholders and judgment creditors.

The cardinal feature of their policy and conduct from the first, from which arose the contention between the parties, and out of which this litigation grew, was their own determination that resort should not be had to their rights under the mortgage—that is to say, under the trust, for it was by the mortgage that the trust was created and defined.

The individual coupon-holders as well are here, claiming as individual judgment creditors, and so far repudiating any claim on the part of the trustees to act in their behalf.

The trustees, therefore, and their *cestuis que trustent* are fully in accord in not having voluntarily exercised at any time during the receivership their rights under the mortgage.

The right to possession was therefore deliberately not exercised by or in behalf of the trustees at any time during the receivership.

At the same time it is true, as has been seen, that it is only by the exercise of this right that any lien upon the

earnings could arise, and then only to such earnings as subsequently accrued.

It is yet equally true that as the only right of the trustees to the earnings must arise from their trust, and the lien of the trust is confined to earnings subsequent to possession, and decree giving them money earned prior to possession is a virtual antedating of possession. The least which this requires is the presence of something of which the trustees may complain that it has prevented a possession they might otherwise have taken; otherwise the action under the decree is wholly outside of the contract establishing the trust. The contract, as has been seen, is the sole basis of right. To take the money of one and give it to another, without right, is confiscation. The fact that the donee is also an unpaid creditor makes it none the less confiscation, though the wrong may be less flagrant. The action of the court in this regard is palpably erroneous, unless some basis for it such as has been described is found.

It is hard to conceive such a basis, in view of the fact that the position of Sage under his bill was always one inviting the exercise of rights under the mortgage. His bill did not pray the preservation of the property and for a sale, but only for sequestration of the income. The receiver appointed under it was a receiver of income only. The interest in this income of the trustees of the preference mortgage was merely a contingent one. They were, therefore, not necessary parties to the bill. Not only was their mortgage abundantly secured, but they had also the right at any moment to possession as trustees. The Sage bill expressly admits this right as well as the existence and validity of the preference mortgage.

Hence it is claimed in behalf of the railroad company, appellant, that even if the court be found justified in treating Sage as without right, the decree should be reversed and the court below instructed to treat this fund as subject to further proceedings.

WAGER SWAYNE,
For Appellants.

123-361

JAN 5 1888
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

No. 126.

RUSSELL SAGE, *Appellant*,

vs.

MEMPHIS AND LITTLE ROCK RAILROAD COMPANY AS REORGANIZED.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR DOW AND OTHERS.

U. M. ROSE.

Press Printing Company, Little Rock, Ark.

In the Supreme Court of the United States.

No. 126.

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BRIEF FOR DOW AND OTHERS.

HISTORY OF THE CASE

On the 24th day of June, 1882, the railroad company confessed a judgment in favor of Russell Sage in the court below for $125,931.13. (Rec., p. 10.)

On the same day Sage filed his bill in the chancery court of Pulaski county, in which he made the following assertions:

He set forth that judgment had been rendered in his favor against the railroad company as above mentioned; that all the property of the company consisted of its line of road and other property particularly described.

On the first day of May, 1877, the company mortgaged all its property to secure the payment of bonds for the aggregate sum of $250,000, and on the second day of the same month it executed a second mortgage, conveying the same property to secure the payment of a further issue of bonds to the aggregate amount of $2,600,000. The bonds embraced in these two mortgages exceeded the amount that the property would sell for.

If plaintiff should attempt to enforce payment of his judgment the trustees named in the mortgage would interfere and prevent the sale under execution of any part of the property.

If the property of said railroad should be kept together and carefully used and worked in its business, it would produce an income sufficient to pay the expenses and necessary repairs of the road, and would in each year leave a large surplus to pay off the plaintiff's debt; but this the defendant refused to do. The property could only be made to yield such income by keeping it all together; and if any of the rolling stock of the defendant, or any material part of its property, should be sold, the plaintiff would not be benefited, and the public would be greatly incommoded by destroying the use of the road in the manner contemplated by the State in the grant of its charter. The defendant had failed and refused to apply the surplus income for the payment of

plaintiff's debt, and would continue to apply its surplus to other uses, to plaintiff's irreparable damage and loss. Plaintiff is remediless at law; and his only remedy is by the appointment of a receiver to take charge of the road, and in that manner seize upon the only means in reach of the law for the satisfaction of his demand. Plaintiff seeks such relief, subject to the rights and equities of the holders of said bonds, or of the trustees named in the mortgages. He therefore prays for the appointment of a receiver, who shall be instructed to take possession of the property and franchises of the defendant for operating its road, and for the payment of all necessary expense and repairs, and wages due to the employes, and to pay over the net income to the payment of plaintiff's judgment, and for all proper relief. (Rec., 6-9.)

On the same day an order was entered in the chancery court which showed the appearance of the plaintiff, the filing of the bill, and that defendant also appeared by counsel, waiving notice of the pendency of the suit, and that the court was of opinion that the receiver should be appointed; and he was accordingly appointed, with direction to give bond in the sum of $50,000 before entering upon his duties.

The order contained extended directions as to the manner in which the road should be operated. It also authorized the receiver to incur a debt for $25,000, to be paid out of the future revenues of the road, which were pledged for the repayment of that sum. (Rec., 2-6.)

Afterwards, on the 10th of October, 1882, John L. Farwell filed his claim and intervention in the suit, in which he represented that he was a stockholder in the company; that during

the year 1881, Jay Gould, Russell Sage and Henry G. Marquand had acquired a majority in value of the stock of the railroad company; that on the 28th day of April, 1882, R. K. Dow, Watson Matthews and Charles Moran had brought suit in the court below against the railroad company for the purpose of enforcing a claim for about $250,000 for money expended in paying off a lien against its property, which suit was then pending in the court below; that the confession of judgment in favor of Sage was made only to hinder the prosecution of said suit, and to depreciate the market value of the bonds issued by the company, also to depreciate the stock of the company, so as to enable Sage, Gould and Marquand to buy it up at low prices; that Gould, Sage and Marquand were men of large wealth, and were able to wait until the stock should rise again in the market, after the discharge of the receiver; that the suit in which the receiver was appointed was a mere pretense and sham, instituted from no other motive than to aid them in making a successful speculation in the stocks and securities of the company; that on information and belief the defendant charges that the company does not owe the said Sage anything. He stated that the total amount of the annual earnings are not less than $750,000; that since March, 1882, the company had not paid any interest on its bonded debt, and that it declined to do so, for the purpose of carrying out the schemes of Gould, Sage and Marquand; that the receiver he had had appointed by consent was general manager of the railroad company, and subject to the orders of its board of directors; that several months had elapsed, that the receiver had made no report, and that no steps had been taken in the suit, except that an order had been obtained authorizing the receiver

to defend suits and to pay costs; that after the receiver had been appointed suits had been brought in the court below against the railroad company, and that the officers of the law could find no one upon whom service could be had, the officers of the company having all resigned their places in accord with the plans of Gould, Sage and Marquand; that the effect of these proceedings had been to damage the stockholders greatly by the depreciation of their stock, and that their stock would be greatly more damaged by the continuation of the fictitious legal proceedings then pending, which would produce the impression that the company was hopelessly involved in difficult litigation. The intervenor made his intervention a cross-bill against the said Sage and the railroad company, and asked that he might be allowed to contest the matters set up in the bill. (Rec., 14–19.)

Other stockholders also applied to be made defendants on like showing. (Rec., 41.)

In November, 1882, statements were filed by the engineer for the receiver to the effect that in order to put the road in good repair, it would be necessary to expend $570,605. (Rec., 12.)

On the 10th of that month the cause was removed to the United States Circuit Court for the Eastern District of Arkansas. (Rec., 22.)

On the same day F. A. Marquand, the president of the railroad company, filed an affidavit in which he stated that the claim of Russell Sage was just and unpaid: "That said company had filed a bill in chancery in the state of New York, seeking relief against an inequitable mortgage and bonds

secured thereby; that certain holders of such bonds had brought actions at law on their coupons, and threatened to bring still other similar actions; that the officers and directors of said company believed that execution in such suits would break up the business of the company, and deponent still and now believes that such would have been the effect; that *in order to prevent the levy of such executions* the defendant company consented to the appointment of a receiver until its bill aforesaid could be heard.

"Deponent further says that it is not true that such action of defendant company was had to enable Jay Gould, Russell Sage, H. G. Marquand, or any other person or persons to speculate in the stocks or securities of said company, and that the allegations of the petition of one Farwell herein, to the effect that such was the case, are false." (Rec., 28.)

Russell Sage filed an affidavit in which he said that he, Jay Gould and Henry G. Marquand held in trust 13,907½ shares of the stock of the railroad company; but alleged that the trust was a mere naked trust, "*not coupled with any interest or ownership whatever, either in himself or either of the other trustees above named.*" (Rec., 31.)

This statement turned out to be a pure evasion; for in the further progress of the cause it appeared that this stock was held by the trustees for the benefit of the St. Louis, Iron Mountain and Southern Railroad Company, that almost all of the stock of that company was owned by the Missouri Pacific Railroad Company, *of whose stock the trustees were very large holders.* (Rec., 78.)

In this affidavit Sage also denies that he owned any bond

of the railway company, or that he, Gould or Marquand intended to depreciate the capital stock or bonds of the company. The bringing of this suit, and the appointment of a receiver therein, he believes to be *for the best interest of all the shareholders of the company and of the trust estate, comprising nearly the whole of the capital stock which affiant represented.* He denied that the company was solvent; denied that the suit was a sham; on the contrary, the suit was for money lent to the company in good faith, in order to enable it to avoid default on its own mortgage bonds, which could not have been done without such loan. (Rec., 31.)

B. C. Brown also filed an affidavit saying that he was chief counsel for the railroad company, had been such for five years past, and was therefore familiar with its affairs. The capital of the company consisted of 15,000, shares of stock of $100 each, and he believes that 14,000 shares are held by persons who have no interest in the bonds of the company. On the 1st day of May, 1877, the company had issued bonds to the amount of $250,000, and for the security of their payment it had executed a mortgage on all of its property and franchises to W. S. Pierson, R. K. Dow and Watson Matthews, in trust to sell and pay off the bonds in case of the failure so to do by the company. On the 2d day of May, 1877, the company issued other bonds for $2,600,000, secured by a second mortgage on the same property, executed to the same trustees, for like purposes. Copies of the mortgages will be found on pages 186 to 208 of the record.

Counsel had advised the company, and its officers and managers believed, that the bonds issued on the 2d day of

May, 1877, were illegal and void. In the month of May, 1882, the company had filed its bill in chancery in the United States Circuit Court for the Southern District of New York, against said trustees and others, praying that said bonds might be canceled; which suit was then pending. Dow, Matthews and Moran had as trustees under the second mortgage, paid off a debt that was a lien on the property of the company, and had brought suit for repayment against the company, which was pending, and in which the defendant had pleaded the invalidity of the second mortgage bonds; and that suit was then pending. One Cossitt had brought suit on coupons of the second mortgage bonds, which suit was also still pending.

Dow had told affiant that if default was made on the coupons of the second mortgage there would be no foreclosure; *but that the bondholders would sue at law, and would sell the road under execution.* The company had failed to pay the coupons maturing January 1, 1882, *and in less than a week afterwards one of the said bondholders attached the funds of defendant in a suit at law in Memphis, Tennessee;* but the amount sued for was afterwards paid, and the attachment was dissolved. The company had also defaulted on the interest that fell due July 1, 1882.

By the terms of the mortgage, if default on the coupons should continue for sixty days, the bondholders had a right to declare the whole debt due, and to foreclose; but though there had been a default for more than that period, *the bondholders would not foreclose; but suits had been brought at law on the coupons.*

The affiant concludes as follows:

"Affiant says that, as in duty bound, he communicated such threats to his client, and that, believing the same were earnest, and seeing that they would be carried into effect, he, seeing no other way to *protect his client* until it could bring its suit for cancellation of said mortgage to a hearing, advised it *not to oppose the application made for a receiver in this cause;* also advising it *that by this court the funds received by defendant from its business would be cared for, and applied for the best interests of all parties;* and he says that defendant took its action in this behalf solely to enable it to have a fair hearing, and while obtaining such *to protect itself from being harassed, and its business destroyed by suits at law as threatened*, and also that all parties might be assured that its funds would not be paid to its stockholders or otherwise misapplied. Affiant further says that he was consulted about the debt for the recovery of which the plaintiff in this cause brought suit in the United States Court, and for which defendant confessed judgment, and knows that said debt was just and due, and that it was for money advanced for defendant to meet its pending securities." (Rec., 39.)

R. K Dow and Watson Matthews, as surviving trustees, filed their claim and intervention on the 23d day of February, 1884, in which they allege the execution of the mortgage of May 1, 1887, that all of the bonds except certain ones to the amount of about $50,000 were due, and that those not due would mature in the month of May, 1884; that with the exception of a decree in the court below superseded on appeal, this mortgage was the first lien on the property conveyed by it. No part of the bonds had been paid, nor any of the interest thereon which had accrued since the first day of Janu-

ary, 1882. They prayed that the money in the hands of the receiver might be applied in payment of said bonds.

Dow, Matthews and Moran, as trustees under the mortgage of May 2, 1877, also filed a like claim and intervention, pleading the execution of the mortgage, that no interest had been paid on the coupons secured by the mortgage since July 1, 1882; that the present suit was brought by collusion between Sage and the railroad company, for the fraudulent purpose of hindering and delaying the collection of the debts of the latter, and praying that the money in court might be applied in payment of the overdue interest on said bonds.

In the usual verbose manner the mortgages referred to convey to the trustees the road and all the property of the company "now owned or hereafter to be acquired," including "all the income, rents, issues, tolls, profits, receipts, moneys, rights, benefits and advantages had, received or derived by the said railroad company from its railroad, or other property, or in any other way whatsoever."

On the 3d day of December, 1883, the court below discharged the receiver on its own motion; and he was ordered to turn the property in his hands over to the railroad company; and that out of any money in his hands he pay all sums and dues authorized by the order appointing him; "and that he retain the residue subject to the further order of this court."

F. H. Cossitt filed his claim and intervention, alleging that he had recovered judgment in the court below against the railroad company for $9,461.55 on coupons issued on the bonds of May 1, 1887; that the suit was brought in collusion between Sage and the railroad company, for the purpose of cheating,

hindering and delaying the creditors of the latter; that during the time the receiver was kept in possession of the property by the fraudulent abuse of the power of a court of equity, the fund then in the registry of the court had accumulated in his hands from the operation of the railroad. Petitioner stated that he did not know whether the Sage judgment was rendered for a valid debt or not, but he charged that if it was a valid debt it was collusively and unnecessarily created, with the sole object of bringing this collusive and fraudulent suit for the purpose aforesaid; and he prayed that his judgment might be paid off out of the fund in court. (Rec., 216.)

Like petitions were filed by Amos R. Eno on a like judgment for $58,945.02, and by Harry Talmadge on a like judgment for $3,574.17.

Ira S. Colby filed a claim and intervention setting up a judgment recorded in the court below in his favor against the railroad company on coupons of bonds issued on the 2d day of May, 1877. He made the same allegations of fraud that were made by Cossitt, and prayed that his judgment might be paid off out of the fund in the court. (Rec., 224.)

Interventions similar in all respects to that of Colby were filed by W. B. Miller, William Breck, H. Sanford, E. W. Barnes, Thomas Stokes, R. K. Dow, William Clark, G. T. Bonner, Charles Moran, F. H. Cossitt, E. C. Stokes, William M. Chamberlain, H. M. Juilliard, H. E. Bailey, M. C. Dodge, M. L. Dodge, William A. Goodwyn, W. G. Wheeler, George E. Dodge, George Dow, A. D. Juilliard, John L. Farwell and W. D. Miller. (Rec., 217.)

The court on discharging the receiver, which was done on its own motion, delivered an opinion, in which it said:

"——— the complainant and defendant have sought to make use of this court as an instrument to carry on through the hands of the receiver the important business of the defendant corporation; and this not for the purpose in good faith of enforcing the confessed judgment set up in the bill, but for the purpose of protecting the property of defendant from seizure under legal process, while the earnings are being applied to the improvements of the road." (Rec., 238.)

The court made an order by which it referred the question as to the charge of fraud and collusion to a master, allowing plaintiff and defendant to make answer to the claims of the intervenors; which they never did. The master was allowed sixty days within which to take testimony; and he was directed to examine the records of the court and to report as to all suits that might have been brought within six months before the commencement of the present suit, in which any of the parties to the present suit were parties, the amounts and matters involved therein, the grounds of the suits, the defences interposed, the final judgment and decrees therein as far as rendered, whether writs of error or appeals had been taken, and what mortgages had been executed by the defendant. (Rec., 57.)

The following is a synopsis of the report of the master: (Rec., 70.)

The total amount of money that came to the hands of the receiver was $1,675,919.73; his disbursements were $1,456,-

920.75; leaving a balance in his hands of $218,998 98; which had been deposited by him in the court. (Rec., 73.)

During the time that the receiver was in office he had expended $300,000 for betterments and new construction on the road. (Rec., 76.)

During that time the operating expenses were $741,413.-82. (Rec., 77.)

He reported the two mortgages executed by the railroad company above referred to.

He reported judgments in favor of all the intervenors as claimed by them. (Rec., 80.)

As to the judgment by confession in favor of Sage, the master reported that it was founded on two promissory notes, one executed by the railroad company to Marquand, president of the railroad company, for $15,000, and the other executed by it to Jay Gould, president of the Missouri Pacific Railway Company, for $115,479.03, signed by Marquand, president, and both endorsed to Russell Sage.

The master reported also that Dow, Matthews and Moran as trustees under the mortgage of May 2, 1877, had, on the 14th day of May, 1883, recovered a decree in the court below against the railroad company for $291,036, for money paid to take up a lien on the property of the company, from which an appeal was taken to this court, which was still pending. (Rec., 85.)

[The decision of that cause is reported under the title of the *Memphis and Little Rock Railroad v. Dow, 120 U. S., 287.*]

The master reported that "the judgment of Russell Sage and the proceedings by him in this cause have been fraudulent and collusive with the defendant; that this cause was instituted in collusion with the defendant, for the purpose of hindering and delaying the creditors of defendant, and that defendant was a party to the collusive proceedings herein for the same purpose." (Rec., 99.)

The report of the master showed the following additional facts:

The note for $115,479 was executed June 20, 1882. *On the same day* Sage wrote to J. C. Brown, general attorney of *defendant*, asking him to employ counsel at Little Rock to enforce his claim against the defendant; and two days later the attorney representing Sage in the court below was retained for him by Mr. Brown.

On the day of the execution of the note Mr. Hayes, vice-president of defendant company, telegraphed to Sibley, general manager of defendant in Little Rock, notifying him that the president would call a meeting of the directors of the company, to be held at St. Louis, Missouri, on the 22d of the month. On the 20th or 21st of the same month Sibley was notified by Mr. B. C. Brown, another attorney of the *defendant*, that a bill would be filed for a receiver, and that the former would probably be appointed. On the 22d of the month the directors' meeting was held in St. Louis on a single day's notice, and a resolution was adopted reciting the claim of Sage, and authorizing a confession of judgment on it. No other business was done at that meeting. On the 23d of June, the day before the judgment was confessed, one Black

executed a power of attorney to Mr. B. C. Brown, attorney for *defendant*, authorizing him to sign his name as surety on the bond to be given by Sibley as receiver.

The bill asking for the appointment of a receiver was prepared before the confession of the Sage judgment, and it was seen by counsel for *defendant* before it was filed. It was prepared by counsel for plaintiff from a memorandum furnished him by *some one whose name the counsel refused to give*. At the time the judgment was rendered plaintiff's counsel was informed that no objection would be made to the appointment of a receiver. It was the counsel of *defendant* who suggested that its general manager should be made receiver; and the order appointing the receiver was drawn up by counsel for the *defendant*. Marquand, the president of the defendant company had stated in an affidavit that "in order to prevent the levy of executions, the defendant company consented to the appointment of a receiver until its bill aforesaid (meaning the New York bill) could be heard." No suits were brought on coupons until more than three months after the appointment of the receiver. On the 27th day of June, 1882, Sibley resigned as a director of the company. About the same time B. C. Brown, another director, did the same thing. On the 2d of October, 1882, Goodwin, secretary of the company, at the suggestion of the receiver and general manager, also resigned, *in order that process might not be served on defendant.*

Substantially all the stock of the defendant company is owned by the Missouri Pacific Railway Company, and the former company is managed and controlled by the latter, of which Sage is a director. He was present at the meeting of

the said executive committee on the 20th day of June, 1882 the day the large note was executed and transferred to him, when the committee passed a resolution to sell him the note for *one-half* of its face value, to be paid in ninety days from that date; *but after the lapse of about twenty-three months he had never given any note for that sum, or paid a cent on it.* The defendant company on the 6th and 10th of March, 1884, paid to *the Missouri Pacific Railway Company* $16,936.05, on account of *Sage's judgment against the defendant company*, Sage never having collected anything on account of his judgment. Sage also knew that the vice-president of the defendant company had offered this judgment in compromise with its bondholders; and he had authorized that offer to be made. The Missouri Pacific Railway Company had paid Sage's solicitor $400 for his services in this suit, and had paid for printing a brief for Sage herein; had paid fees of counsel for the Equitable Life Assurance Society, and for printing a brief of his in a suit brought by the latter against the defendant for foreclosure of its mortgage of May 1, 1877; and, to sum up this matter, had paid out about $10,000 for legal services, expenses and printing *on both sides* of this suit, and on *both sides* of the suit of the Equitable Life Assurance Society, and costs in other courts connected with this litigation.

This sum of $10,000 was not paid until after the discharge of the receiver, probably because if it had been paid by him it would not have passed in the master's office. The coupons of the defendant company bought by H. G. Marquand and testified to as being a part of the consideration of the $115,000 note assigned to Sage, are shown not to have been bought by him for the defendant company, but by himself as "an out-

sider." These coupons have never been filed in the office of the treasurer of the company in Little Rock, as was customary when coupons were paid off. Sage at first testified that he had given his claims for collection to Dillon & Swayne, and that they had sent them to B. C. Brown at Little Rock, they all being retained attorneys of the defendant company. (Rec., 148.) Later he came back on the stand to say that he had made a mistake, and that he had sent them to S. R. Cockrill, "inclosing it to J. C. Brown (attorney of *defendant*), in St. Louis." (Rec., 157.)

The master found that Sage had never paid anything for the $115,000 note, and that he was not the beneficial owner of it, or of the judgment rendered on it.

The report of the master displays the fact that it was carefully prepared after a very full examination of the facts as proved.

After the court had determined to discharge the receiver, counsel for plaintiff and defendant presented to the circuit judge a written agreement, signed by them, stipulating that the receiver should be discharged upon filing the receipts *of the defendant* for the balance in his hands; and an order was signed by the judge to that effect, "under the impression that all the parties in interest had consented thereto." Finding before it was too late that there were intervenors claiming the fund, who had not consented to the order, it was recalled. (Rec., 24.)

Thus, after the suit had been pending for nearly eighteen months, during which time the receiver had paid out $1,456,920.75, and had expended far more than the amount of plain-

tiff's demands in betterments and improvements on the road, the plaintiff consented that the balance of the fund in court, amounting to more than $200,000, should be returned to the *defendant company*, which he alleged to be *insolvent*, without having received one cent from this extensive and costly litigation. Of this singular fact no explanation was offered.

In the testimony before the master, John W. Goodwyn, the secretary of the defendant company, was examined as a witness for plaintiff. The following is an extract from his testimony:

Q. "Did you tender your resignation about October, 1882?"

A. "Yes sir, October 2, I think, addressed to the president at New York."

Q. "What induced you to do that?"

A. "I think Mr. Sibley said it was desired."

Q. "On what ground did he say it was desired?"

A. "I think it was that *they did not wish any representative of the company here.*"

Q. "What reason did he give for not wishing any representative of the company here?"

A. "As well as I remember *it was to keep from having some papers served on the company. I don't remember what suit it was.*" (Rec., 123.)

The master reported that the fund on hand should be paid to Dow and Matthews, trustees under the deed of trust of May 1, 1887.

The plaintiff excepted to his report, because:

1. Of his finding as to fraud and collusion.

2. Of his finding that the creditors of defendant were hindered and delayed.

3. He failed to find that the intervenors had waived their right to complain of the alleged fraud.

4. He failed to find that the plaintiff's judgment was based on a just and valid debt.

5. He failed to find that said judgment should first be paid out of the fund in court. (Rec., 151.)

The judgment creditors also excepted to the report of the master, alleging that their judgments should have been paid out of the funds in court.

All exceptions were overruled; and the court decreed that the money in its registry in this cause should be paid to Dow and Matthews as surviving trustees in the mortgage of May 1, 1877, the same to be by them distributed among the beneficiaries in that mortgage. Sage took an appeal to this court. (Rec., 211.)

The intervening judgment creditors also prayed an appeal, which was granted.

BRIEF.

As to the facts, no ground of contention exists. The master's report is sustained on all points by undoubted proofs. Before a word of testimony had been taken the fraudulent and collusive character of the proceeding had become apparent to

the court below. The affidavits read on the part of the plaintiff amounted to an open confession of the indirect and ulterior objects sought to be obtained by the institution of this suit.

We are not concerned with the question as to whether the railroad company could have claimed the money accumulated by the receiver; for the company did not claim it, [redacted]

Of course it was contended in the court below that the railroad company had unlimited control over the fund; and reference was made to *Gilman v. Ill. Tel. Co., 91 U. S., 607; Galveston v. Ry. Co., 11 Wall, 483*, and *American Bridge Company v. Heidelbach, 94 U. S., 798*, where it is declared in effect that where a mortgage executed by a railroad company grants its income, with privilege to the mortgagor to use its income until possession is taken by the trustees named in the mortgage, in operating the road, the trustees cannot claim any part of the income accruing before they take, or at least demand possession.

Those cases were, however, in no wise like that at bar; they were cases where there were contests between the trustees and *bona fide* creditors of the mortgagor. We have then all the difference between an honest creditor and a fraudulent claimant who has trumped up a spurious claim for the purpose of cheating, hindering and delaying honest creditors. The methods that the law has devised for the protection of the one can hardly be invoked for the accomplishments of the ends of the other.

The decisions of this court on this subject have been fol-

lowed in Massachusetts; and the supreme judicial court of that State give this reason for the rule that was laid down in the cases we have referred to, as follows:

"——. It is a requirement of public policy, that parties dealing with the corporation, or injured by it, should [shall] have the right not only to sue the party with which they deal, or which has injured them in the prosecution of its business, but also to secure themselves upon any moneys or chattels, the proceeds of that dealing and business, by means of the remedies provided for in like cases between [natural] persons."

Smith v. Eastern Railroad, 124 Mass., 157.

The rule is established then for the advantage of meritorious creditors; and can have no application for the purpose of propping up a scheme devised for their overthrow.

In *Gilman v. Ill. Tel. Co.*, it is conceded that any money derived from operating the road after the appointment of a receiver could go to the trustees. The court say:

"It is clearly implied in these mortgages that the railroad company should hold possession and receive the earnings until the mortgagees should take possession, *or the proper judicial authority should interpose.*"

Here judicial authority did interpose. Pending the receivership the fund accumulated in the court after all operating expenses of the road were paid. By the terms of the mortgage the mortgagor is estopped from claiming this money, which is dedicated to the payment of its bonds.

While the receiver was in possession the trustees could not take the property into their custody so as to appropriate

its income; and certainly the bondholders should not suffer a loss because by collusion with another the mortgagor has prevented the bondholders and trustees from securing the same fund in another and a legitimate manner.

By the terms of the mortgages the trustees could only enter into possession on the written request of a majority of the bondholders in value; a troublesome process requiring time for its execution. In the meantime the debtor was accumulating a fund, not to be used for the legitimate purpose of operating the road, but in payment of the spurious demand of a fraudulent accomplice.

Certainly a case of this kind requires a separate treatment; for if the fund is to be paid over to the fraudulent parties, the court must not only condone the fraud, but must pay a reward for its commission.

Where under a mortgage like that now before the court the question as to the right to the surplus income is between the mortgagor and the mortgagee alone, the surplus must be awarded to the latter, because such is their contract, and any other disposition of the fund would be an act of bad faith.

Pullan v. Railroad Co., 5 Bissell, 247.

On that subject we append an opinion delivered by Hon. H. C. Caldwell, United States District Judge of the Eastern District of Arkansas, in another case involving the construction of the same mortgages, in which the principle is stated in a manner that cannot be answered. That case is also pending in this court; but stands on different grounds from that now under discussion. In that case the circuit judge, who con-

curred in the judgment in this case, was of opinion that the fund, under all the circumstances disclosed, should go to the insolvent company.

Doze v. Memphis Ry. Co., 20 Fed. Rep., 768.

In that case the railroad company claimed the fund. Here it does not; and in that case the fund was not the result of a fraudulent proceeding.

But apart from the clause in the mortgage pledging the income and money of the company to the trustees, the money was ~~purposely~~ decreed to them; for, by reason of the trust relationship between the parties and the admitted insolvency of the company, a court of chancery had jurisdiction to apply the fund to the payment of the bonds whose holders were represented by the trustees, though no judgments at law had been recovered on them.

Case v. Beauregard, 101 U. S., 688.

In that simple aspect of the case the suit would be one for equitable garnishment.

King v. Payan, 18 Ark., 583.

And as between the claims represented by the trustees and the simulated demand of Sage a court of chancery could not hesitate.

The suit seemed to be based on a contention that when a corporation gets in debt beyond its present means of payment, it may fly to a court of chancery as to a house of refuge; and may ask its assistance to keep its creditors at bay. The entire disinterestedness of such a proceeding was a curious

feature. The application was not supposed to be made wholly in the interest of the corporation, or of its stockholders. Whatever interest they might derive from hindering and delaying their creditors in this way would be only incidental, the chief object sought by them being not any pecuniary benefit or gain for themselves, but only the promotion of the public good, which was supposed accidentally to coincide with their own advantage. The judicial history of the country will show to what extent this notion was pressed by the same parties who devised the present litigation. To what remote conclusions the theory would have led if it had been reduced to successful practice was not defined. As the courts know no favored suitors, and individual bankruptcy in all cases inflicts a blow, more or less appreciable, on public prosperity, no reason is perceived why in all cases of embarrassment or insolvency pursuing creditors might not have been delayed and baffled in the same way. Hardly any case, however, could be more extreme than the present one; for the record shows that if the defendant company had used the same energy in the payment of its debts that it exhibited in trying to cheat, hinder and delay its creditors, its efforts would have been attended with tolerable success. As for professions of regard for the public good, they are not protected by any copyright; and they may be freely used both by natural and by artificial persons as may suit their convenience.

The object of the plaintiff and defendant in this suit being to keep the property of the latter in the hands of a receiver indefinitely, during which time there should be no officer of the defendant upon whom legal process could be served, the

whole proceeding was stamped with the grossest fraud. As was said in *Drury v. Cross, 7 Wall., 303:*

"If the law permits the debtor in failing circumstances to make choice of the persons he will pay, it denies him the right in doing it to contrive that the unpreferred creditor shall never be paid. In other words, the law condemns any plan in the disposition of property which necessarily accomplishes a fraudulent result."

It has often been remarked that the statutes against fraudulent conveyances are merely declaratory of the common law, which unaided would have worked out the same results. But the statute in Arkansas is amply broad enough to cover the device to which recourse was had in this case. That statute declares that "every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, *suit*, judgment, decree, or execution, made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchasers prior and subsequent, shall be void."

Mansfield's Dig., St. Ark., 1884, Sec. 3374.

"Every attempt by a debtor to violate or evade the law, so as to delay his creditors in the collection of their debts, to the hindrance of the due course and execution of the law, is unquestionably fraudulent and void as against such creditors."

Kimball v. Thompson, 4 Cushing, 447.

"The creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract. These principles are not disputed."

Robinson v. Elliott, 22 Wall., 523.

The principles thus declared are recognized as being elementary.

How could Sage hope to participate in a fund raised through the instrumentality of the fraudulent device contrived by himself and by the defendant?

If he could do that the statute would necessarily be violated; for, instead of his scheme being "void," it would be thoroughly effectual; and the guilty party, by virtue of a decree in chancery, would carry off the spoils. The law would not only be annulled; but the courts, by assisting in the success of the unlawful device, would render themselves accessory to the fraud. A contention that so far violates fundamental principles cannot be sustained.

The rule on this subject was stated by Mr. Justice Story:

"A deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimburse-

ment or indemnity; but it is otherwise with a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent."

Bean v. Smith, 2 Mason, 252.

When a fraudulent claim is set aside at the suit of the creditor, another creditor who has participated in the fraud will not be allowed to share with the plaintiff in the proceeds of the litigation.

Smith v. Kraft, 11 Bissell, 351.

In the case of *Wilson v. Horr, 15 Iowa, 493*, it was not denied that a large part for which the mortgage was executed was just, but the intent of the mortgagee was to hinder and delay other creditors; and the court therefore held it to be void. The fraudulent grantee then claimed that he had a right to participate in the fund. Chief Justice Wright, in delivering the opinion of the court, said:

"Under such circumstances we are not aware that it has ever been held that the fraudulent creditor is entitled to come in *pari passu* with other *bona fide* creditors for a distributive share out of the property which is the subject of the fraud. If so, while he might not receive a premium for his violation of an express penal statute, he would at least be recognized as having clean hands, and entitled to the same protection as the most honest creditor, and that, too, in a court which, while it may not punish such violation of law, certainly will not disregard what is due to the diligent, whose conscience is untainted with fraud."

In Arkansas we have also a penal statute against fraudulent conveyances, as follows:

"Every person who shall be a party to any conveyance or assignment of any real estate, or interest in any real estate, goods or chose in action, or any rents or profits issuing therefrom, or to any charge upon such estate, with intent to defraud any prior or subsequent purchaser, or to hinder, delay, or defraud creditors or other persons, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in any sum not less than $500."

Mansf. Dig., sec. 1649.

If Sage had a judgment at law, yet in the eyes of a court of chancery, by the light shed on the transaction by the testimony in this case, that judgment is no judgment. If he has a debt against defendant, it is simply a debt evinced by the contract.

In *Hill v. Elliott, 12 Mass., 31*, Parker, chief justice, in speaking of conveyances made for "the purpose of hindering and delaying creditors," said that fraud "may always be proved by parol, and when so proved renders wholly inoperative the formal transactions which may have been adopted for such purposes by the parties."

In *Harris v. Sumner, 2 Pick., 137*, the court approved this principle, saying that "it would be no discouragement to such practice if a party grantee could avail himself of all his claims after the legal fraud should have been detected, as he might have done if he did not join or aid in such an unlawful attempt, or had taken a conveyance for the security of his own debt, or for other lawful purposes."

It is true that in *Murry v. Riggs, 2 Johns. Chy., 565*, where a deed of assignment was set aside for *constructive* fraud, the

grantee was allowed to come in for his distributive share of the fund.

The case was reversed by the court of errors on the ground that there was no fraud either actual or constructive.

Murry v. Riggs, 15 Johns. R., 571.

In the case of *Beach v. Viles, 2 Peters, 678*, the court followed what was thought to be the Massachusetts rule, and held the same doctrine; but only did so on the express ground that there was no *actual* fraud. This decision was based on the case of *Andrews v. Ludlow, 5 Pick., 28*, where the court found that there was no fraud either actual or constructive.

It is not necessary to dwell on these cases, as they have no application to the case where a corrupt motive is charged and proved.

Where a deed is executed in contravention of some principle of law, but without any fraudulent intent, the courts may hold that the grantee is not to be punished for mere inadvertence; but where a well-defined intent to defraud others is manifest, the courts cannot confer any benefit on a party to the fraud without making themselves a party to the fraudulent device. If they should do so, they would with one breath condemn the transaction and enforce its execution.

In a case of a deed that is constructively fraudulent the conveyance is simply void; and the creditor stands with regard to his debt just as if the deed had not been executed; but, in this case, fraud entered into the inception of the transaction and gave color to it from beginning to end.

The creation of the supposed debt on which the judgment

was based was a part of one indivisible scheme to defraud and injure others. Such a claim cannot be allowed to enter into competition with the claims of creditors that are without suspicion; and certainly we can find no case where a creditor has ever been guilty of actual fraud in a proceeding by means of which a fund has been raised, where he has been allowed to participate in the fund.

If such a case can be found in the books it has escaped our attention.

In the case of *Millington v. Hill*, 47 *Ark.*, 311, a fraudulent purchaser of lands had actually paid out moneys in carrying out the contract of purchase in discharge of a debt of her grantor, and she claimed that when the conveyance was set aside she should be reimbursed for this expenditure; but the court refused, saying that "he that hath committed iniquity shall not have equity."

The decision in that case was based partly on a like ruling of this court in the case of *Railroad Company v. Soutter*, 13 *Wall.*, 525.

In that case the court said:

"The bare statement of the claim, even presenting it in the language of the bill itself, seems to us sufficient to condemn it. Who are the complainants? Are they not the very bondholders, self-incorporated into a body politic, who, through their trustee and agent, effected the sale which was declared fraudulent and void, as against creditors, and made the purchase which has been set aside for that cause? Was it ever known that a fraudulent purchaser of property, when deprived of its possession, could recover for his repairs or improve-

ments, or for incumbrances lifted by him whilst in possession? If such a case can be found in the books, we have not been referred to it. Whatever a man does to benefit an estate, under such circumstances, he does in his own wrong. He cannot get relief by coming into a court of equity. By the civil law, the possessor, even in bad faith, may have the value of his improvements, if the real owner choose to take them. The latter has an option to take them or to require their removal. But this rule has never obtained in the common law, nor in the system of English equity. One of the maxims of the latter system is, 'He that hath committed iniquity shall not have equity.' And various illustrations of it are furnished by the books. * * * It is stated that Russell Sage, one of the defendants, who received a large portion of the money paid into court, was also a large holder of bonds under the Barnes mortgages, and advised and encouraged the sale to Barnes, and participated in the organization of the complainant's company. All these facts may be true, and on the demurrer to the bill must be taken as true; but they do not show, nor is it alleged, that Sage was personally a participant in the fraud which was committed in the sale under the Barnes mortgage. And if it were so alleged, can one fraud-doer obtain relief in equity against his *particeps criminis?*"

In the present suit Sage is not only trying to get relief against his *particeps criminis*, but also against innocent parties, for whose detriment his fraudulent devices were planned and practiced. As a "doer of iniquity" he is conspicuously pre-eminent.

His honor, Judge Gresham, in *Beers v. Wabash Ry. Co., 26 Am. and Eng. R. R. Cases, 453*, said:

"It is unusual and novel, to say the least, to entertain a bill filed by such a corporation against its creditors, and at once, and without notice, place the property in the hands of one or more of its directors, whose management has been unsuccessful. Receivers should be impartial between the parties; and stockholders and directors of insolvent corporations should not be appointed, unless the case is exceptional and urgent; and then only on the consent of parties whose interests are to be intrusted to their charge."

If the courts approve of that sort of thing there is good reason for thinking that the novelty of the proceeding will soon wear off. For although Mr. Sage was a very active party in that case as well as in this, yet the nature of his device forbids us to think that it is proprietary, and leads us to suppose that if it is ultimately successful it may come into general use.

But if Judge Gresham had known of the present suit, brought in the name of Sage, but really in the interest of the railroad company, which he and his confederates owned, he might have been surprised at his moderation as displayed in the cause before him; for in this case he had the general manager of the directors appointed receiver of property worth some millions of dollars, on the execution of a paltry bond of $50,000, and then proceeded to destroy the directory!

As was said by Treat, D. J., in *Blair v. St. Louis Ry. Co., 22 Fed. Rep., 37*, "Courts cut through all such contrivances when designed to defeat honest claims, or when they practically look to that end."

In *Ruckman v. Conover, 37 N. J. Eq., 583*, it was held that

"whenever it appears that the object of a suitor filing a creditor's bill is to aid a person who has placed his property in the name of another to hinder and defeat creditors, to regain control of such property, a court of equity will refuse its assistance."

This case is however far worse than any that has ever come before the courts; for it is apparent that the defendant did not owe Sage anything; and that behind the scenes the whole pretence of a debt due to him was, as the master reported, "a juggle" between the defendant and the Missouri Pacific Railway Company, which owned substantially all the stock of the defendant company, the sole object and purpose being to cheat, hinder and delay the creditors of the latter.

The bondholders being very numerous, the trustees properly represented them in the court below:

Kerrison v. Stewart, 93 U. S., 155.

Carey v. Brown, 92 id., 172.

Boyd v. Jones, 44 Ark., 316.

Dickenson v. Harris, 48 ib., 358.

"The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust to which they are not actual parties; and whatever binds him, if he acts in good faith, binds them."

Shaw v. Railroad Co., 100 U. S., 611

Finally, we are unable to perceive on what theory Sage's appeal is prosecuted. In his bill he only prayed the relief sought "*subject to all the rights and equities of the holders of said bonds, or of their trustees.*" (Rec., 8.)

He cannot therefore complain of a decree establishing the superior claim of the trustees.

Water Works v. Barret, 103 U. S., 516

Pacific R. R. Co. v. Ketchum, 101 id., 289.

U. S. v. Babbitt, 104 U. S., 767.

We submit that if there had been no clause in the mortgage as to money and income, the trustees might have claimed the fund simply by this proceeding as an equitable garnishment. They had a duty to perform for the protection of the numerous bondholders scattered throughout the world. The company admitted its insolvency. There was a fund in court unappropriated, which could only be reached by an intervention. The right of the trustees to intervene was clear.

Day v. Washburn, 24 How., 352.

Wiswall v. Sampson, 14 How., 66

American Bridge Co. v. Heidelbach, ubi sup.

Williams v. Gibbs, 17 id., 256

Ex parte Boyd, 105 U. S., 652

Re Howard, 9 Wall., 175.

Galveston Railroad v. Cowdry, 11 id., 478.

The New York statute referred to in *ex parte* Boyd has been enacted in Arkansas.

Mansf. Dig. (1884), sec. 3084.

Prior to the beginning of the equitable proceeding that

act requires the issue of a writ of execution, and a return of "no property found." That part of the act was repealed by an act approved March 31, 1887, which enacts "that in suits to set aside fraudulent conveyances and to obtain equitable garnishments, it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency; but in such cases insolvency may be proved by any competent testimony, so that only one suit shall be necessary in order to obtain the proper relief."

Acts of Ark., 1887, p. 193.

This act is substantially similar to one enacted in West Virginia, and lately acted on by this court in *West Fairmont Gas Coal Co. v. Dewey, 8 Supreme Court Rep., 150.*

The property of the railroad company could not be sold under execution by judgment creditors whose judgments were based on coupons secured by the mortgages.

Tyce v. Annin, 2 Johns. Chy., 130.

2 Jones Mortg., sec. 1229.

Nor can the property of a railway company be sold under execution.

Gue v. Tide Water Canal Co., 24 How., 257.

Railroad Co. v. James, 6 Wall., 750.

Jackson v. Ludeling, 21 id., 623.

Where an execution can accomplish nothing its issue is not a prerequisite to the filing of a creditor's bill.

Wright v. Campbell, 27 Ark., 641.

Besides, the admission of Sage that the property mortgaged would not suffice to pay the mortgage debt showed that the issue of an execution would have been unavailing. *Lex neminem cogit ad vana seu inutilia.*

Moreover, as was said by Chief Justice Marshall, "it is also true that if a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim be first established in a court of law."

Russell v. Clark, 7 Cranch., 89.

For other suggestions that may have an important bearing on the claim of Sage, we beg leave to refer to brief filed for Dow and Moran, trustees in case No. 127, submitted herewith.

Respectfully,

U. M. ROSE.

APPENDIX.

In the United States Circuit Court

FOR THE EASTERN DISTRICT OF ARKANSAS.

DOW ET AL,

603 v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY.

CALDWELL, D. J. I dissent from the judgment of the court on the motion to strike out that portion of the order in this case which requires the company to turn over its moneys on hand derived from the operation of its road.

The money was turned over to the receiver with the other property included in the mortgage, and is now in the hands of the receiver.

The order requiring the company to turn over the mortgaged property follows the language of the mortgage—it is neither broader nor narrower. In effect therefore the motion is one to strike an important clause out of the mortgage, viz.: all that relates to the income and earnings of the road, and the money of the company on hand.

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I think the order was properly framed, in the language of the mortgage, and that the receiver is entitled to all the property and money covered by the mortgage which was in the

possession of the company at the date of the order, and upon which no third party had acquired any lien. The Gilman and Heidelbach cases (91 and 94 U. S.) are not in point.

Here the controversy arises between mortgagor and mortgagee.

The money was earned and came into the possession of the company after the bill for a receiver was filed.

The operating expenses of the road for the period during which this money was earned were not paid by the company, and these expenses, together with all liabilities incurred by the company for a much greater period, the receiver is required to pay.

The company by its answer confesses its insolvency.

Judgments have been obtained against the company on interest coupons cut from the first mortgage bonds, and executions have been issued on these judgments, and the plaintiffs in the judgments claim that the money should be paid to them, or to the marshal, to be applied on their executions, in case it is held that it is not properly in the hands of the receiver; but they do not contest the right of the receiver.

On this state of facts the receiver is the proper custodian of the fund; and it should be treated as part of the mortgaged estate, and administered accordingly. In the language of Judge Bradley, in *N. C. R. R. Co. v. Drew, 3 Woods, C. C. R., p. 712*, "it is as much a part of the mortgaged premises as are the rails or the cross-ties of the road."

I am satisfied when a railroad company mortgages its income, earnings and moneys, that as between the company

and its mortgagee, upon a bill filed by the mortgagee for default in payment of the mortgage debt, and for a receiver, the mortgage is effectual to pass the right to the money derived from the operation of the road, in the treasury of the company, unappropriated, and upon which no third party has acquired any legal or equitable claim at the date of the order appointing the receiver.

If on the facts of this case the receiver is required to return this money to a confessedly insolvent company, then the provisions of the mortgage relating to the earnings, income, and moneys, are nugatory.

The bill in this case is in effect one for specific performance. It resolves itself down to this question: Is it competent for a railroad company, by contract, to give its creditors a right to or lien upon the income and earnings of its road and its moneys, which will be effectual against the company, in equity, when such earnings and income are actually in its treasury unappropriated, and upon which no third party has acquired any claim or lien, and when the company is insolvent, and has not paid the operating expenses of its road for the period during which the money was earned?

When a court of equity on a bill filed for specific performance of such a contract gets possession of the money, will it return it to the insolvent company, upon the ground that it is not bound by its contract? I think not. The company is estopped by its deed from setting up a claim to the money.

125-361

JAN 5 1888
JAMES H. MCKENNEY, CLERK

In the Supreme Court of the United States.

No. 127.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, *Appellant*,

vs.

RUSSELL SAGE.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR DOW AND MORAN, Trustees.

U. M. ROSE.

Press Printing Company, Little Rock, Ark.

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Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR DOW AND MORAN, Trustees.

The facts of the case are stated in our brief in No. 126, Sage v. Railroad Company.

We understand it to be now contended that if Sage is not entitled to the fund in court, the railroad company has a prior claim upon it. This view of the case, if accepted by the court, would doubtless excite in Mr. Sage a very considerable degree of hilarity. Everything that we have said about the fraud of Sage applies without modification to the proceedings of

the railroad company. In the perpetration of that fraud both parties acted in concert. If the court should give the fund to the railroad company, the money would at once pass to Sage, so that the fraudulent device would achieve a triumphant victory through the fostering attention of a court of chancery.

But the railroad company is not in a position to prosecute a successful appeal in any event. Not by any pleading or other authentic demand did it ever claim the fund. Throughout the whole proceeding it was the servile tool of Sage, ready to do his bidding, and to further his designs in every way that obsequiousness could suggest. Indeed, Sage and the company have been from the beginning practically but one.

By turning to the record, page 180, the court will perceive what was claimed before the master by the railroad company. Nowhere was any claim made that the company was entitled to the fund in court. It did ask, however, that the master declare as a *matter of law:*

First. That the Sage judgment should be paid.

Second. That the *residue* should be paid to the defendant. (Rec., 182.)

Sage's judgment was rendered June 24, 1882, for $125,-921.13. It bears interest at six per cent. per annum from date.

Mansf. Dig., 4740 (Ark. Rev. St. 1884).

The costs, it was conceded in the exceptions of the railroad company to the master's report, should be paid out of the fund. (Rec., 185.) So that the claim of the company, if such it can be called, could only relate to a small part of the fund.

We now beg leave to call the attention of the court to the elaborate exceptions to the report of the master filed by the railroad company. (Rec., 184.) It will be seen that there was no exception to the refusal of the master to find in favor of the railroad company for that part of the fund referred to.

This court will not reverse for any alleged error not indicated in the exceptions filed to the master's report.

Terry v. Commercial Bank, 92 U. S., 456.

Counsel seem to rely on the case of *De Graff v. Thompson, 24 Minn., 452.* That decision does not, however, extend the principle declared in the Gilman and Heidelbach cases, which are cited in the opinion of the court. In that case the trustees, on taking possession of the road, also took possession of money in the hands of the treasurer of the company, which was seized by garnishment sued out by the plaintiff. This fund had accumulated during the time that the company was actually engaged in operating the road; not, as in this case, after the possession of the company had ceased, and after its need for the money in order to perform the duty of operating the road had come to an end. When the reason of the law ceases the law itself ceases.

When a railroad company or other corporation is using its earnings and will not pay its debts with them, a court of chancery will appoint a receiver, with directions to take possession of the corporate property, and to apply its income to the extinguishment of the corporate liabilities.

Covington Draw Bridge Co. v. Shepherd, 21 How., 125.

If this is true, and it is also true that the money, when actually in the hands of a receiver, derived from such income, will not be applied in payment of corporate debts, the law is undoubtedly in a very singular condition; for then a receiver may be appointed for the express purpose of carrying out a certain line of policy which the court in the end must refuse to sanction.

The law cannot be reproached with any such incoherency and inconsistency. If there is ground for the appointment of a receiver for the payment of debts, it is because the debts ought to be paid; and it is the end to be accomplished that justifies the means.

By the resignation of its officers the company had placed itself in a position in which a court of chancery would have felt itself called upon to appoint a receiver for the payment of its debts, even at the instance of a stockholder.

Lawrence v. Greenwich Fire Ins. Co., 1 Paige, 587.

In this case there was no need for the legitimate creditors or stockholders of the company to ask for the appointment of a receiver; for by the very act by which the creditors were sought to be cheated, hindered and delayed, the property was placed in the custody of the law. Henceforth it was in *gremio legis;* and the court was in no wise committed to the policy of furthering the illegal conspiracy by which the appointment of the receiver had been secured; and would hold the money for the benefit of any person that might be equitably entitled to it.

"Though a receiver may be, and generally is, appointed upon the application of but one of the parties interested in

the property which he is to preserve, his holding is not merely for the benefit of such party, or of any other party; it is the holding of the court for the equal benefit of all persons who may be finally adjudged by the court to have rights in it."

Beach on Receivers, sec. 252.

In the case of *Shainwald v. Lewis, 7 Sawyer, 148*, the court said:

"No doubt can, I think, be entertained as to the power of the court to arrest and baffle the defendant, who has already been adjudged guilty of a flagrant fraud in his attempt to consummate it and secure its fruits, in avowed defiance and contempt of the court.

"Says Mr. Chancellor Walworth: 'Where such a fraud has been actually committed by a debtor, where he has intentionally placed or even left that property, which ought to have been devoted to the payment of his honest debts, in the hands of a third person, with a view to evade the justice of the law, and this court, by its ordinary course of proceedings, can reach such property, without doing injustice to any, it does not deserve the name of a court of equity if it has not jurisdiction to afford relief to the injured creditor.'"

Wend v. Pierce, 9 Cow., 724.

The contention of the appellant is that the pledge of the income and money of the company had no binding efficacy whatever; and yet it is not suggested that that part of the contract made by the parties was obnoxious to any principle of law or any rule of public policy. In the Gilman case and in the Heidelbach case the creditors were held to have a superior claim to the fund, because while operating the property from which the income was derived the income was held in trust by the company for the payment of operating expenses. But in this case the fund accumulated when the company was not operating the road, and no debt is shown to exist except the bonded debt and the Sage debt. There is,

therefore, no trust with which the company is or can be clothed; and the contest is narrowed to the antagonistic demands of Sage and the bondholders represented by the trustees. It is by no means true that the clause in question inserted in the mortgage is a nullity.

In *Ketchum v. Pacific Ry., 4 Dillon, 86*, the railway company had borrowed from the county of St. Louis, in the State of Missouri, $700,000, under an act of the legislature authorizing the loan, with an obligation on the part of the company to pay the interest and principal of the bonds issued for the borrowed money out of the earnings of its road. The court held that this agreement constituted a specific lien on the earnings, which was not displaced by any subsequent mortgage. The learned circuit judge, in delivering the opinion of the court, said:

"It is our judgment that the effect of the agreement of the company with the county specifically to appropriate its earnings as provided by the second section of the act of 1865, is to create a lien or charge, statutable in its origin and equitable in its nature, on those earnings, as they arise, which may be enforced by the county, so long as bonds which it loaned to the company remain unpaid.

* * * * * * *

"If a debtor, by a concluded agreement with a creditor, sets apart a specified amount of a specific fund in the hands, or to come into the hands, of another from a designated source, and direct such person to pay it to the creditor, which he assent to do, this is a specific appropriation, *binding upon the parties*, and upon all persons with notice who subsequently claim an interest in the fund under the debtor."

This language was literally cited by this court with approval in the same case on appeal.

Ketchum v. St. Louis, 101 U. S., 307.

In the latter case also this court said:

"It is quite clear that a proposition to make this loan without providing *some security* against liability, would not have been entertained by the county court."

But if the contention of appellant is correct it must follow that a pledge of the income of a railway is *no security* whatever, since it is not binding on the company in any sense. True, the trustees would get the income from the time of taking possession; but that they would do any way, without the clause pledging it for the security of the specific debts.

In the same case last cited this court also said:

"The State, at that time, had control of the entire earnings of the railroad, and if the legislature did not intend to forego any priority or advantage then enjoyed by the State, but designed only to give authority to the county to issue its bonds, that purpose could have been accomplished by the first section of the act of 1865, leaving the county and the railroad company to make such terms and conditions as suited them."

So we say here, that if the intention had not been to give some special or tangible right by the clause in the mortgage relating to the "income, rents, issues, tolls, profits, receipts, moneys," etc., "that purpose could have been accomplished" by leaving that clause out of the mortgage. It is an unsatisfactory method of interpretation that attains its conclusions by cancelling important parts of the instrument to be construed. That heroic remedy can only be resorted to in cases of plain and hopeless repugnancy. Here the mortgage is plain, easily understood and consistent. A saner instrument could not be devised. No promissory note was ever plainer. It needs no construction; and any attempt to construe the clause away savors of that chicane and subtlety, which, having for a long period disgraced the law, and brought

the legal profession into disrepute, have at length been abandoned as unworthy of the judicial mind.

The construction given by this court to stipulations like that now under consideration has had no other object than to promote the intention of the parties.

For the purpose of making this apparent, let us examine the opinion in *Ketchum v. St. Louis* still farther. The court say:

"It is manifest that while the legislature intended, by the language last quoted, to facilitate the sale of the bonds, and thereby secure the early completion of the road, it intended also by the second section of the act to assure the county of St. Louis that its absolute liability to holders of its bonds was largely nominal, since, by that section, out of the *earnings* of the property, to the extent necessary, and whether the funds of the company were in the custody of the fund commissioner or of some other person, the interest on the bonds should be paid at maturity, and such payments continued until the bonds were paid.

"That the legislature intended by the act of 1865 to make a *specific appropriation of the earnings for that purpose;* that the prior lien of the State was, to that extent, waived in favor of the county; *and that such appropriation and waiver were, by agreement of all the parties then interested in the property, and the disposition of its income, to continue until the bonds themselves were paid or the county discharged from liability thereon, we entertain no doubt. It was not a simple, naked covenant to pay out of a particular fund; but the act being accepted by the parties interested, operated as an equitable assignment of a fixed portion of that fund—an assignment which became effectual without any further intervention upon the part of the debtor, and which the party holding the funds of the company, whether the fund commissioner or some other person, could respect without liability to the debtor for so doing.* It was an arrangement, based upon a valuable consideration, which neither the State nor the company, nor both, nor parties claiming under either, with notice, *could disregard without the assent of the county, expressed by those who had authority to bind it. It was an engagement to pay out of a specially designated fund, accompanied by express authority to its custodian to apply a specific part thereof to a definite object, in the accomplishment of*

which all the parties to the arrangement were directly interested. To construe the act otherwise will not only do violence to plain words, requiring no construction, but convict the legislature of a deliberate design to entrap the county of St. Louis into incurring an enormous debt primarily for the benefit of the State, which controlled the earnings of the property for its own benefit."

What is the difference between earnings in the hands of a fund commissioner, who is an officer of the State, and funds in the hands of a receiver, who is an officer of the court? The functions and responsibilities of both officers were the same.

The court further said:

"We are of opinion that no insuperable obstacle exists in the way of a court of equity giving effect to this agreement or contract between the parties as against those whom the law charges with notice thereof. The relief granted by the decree seems to be in accordance with established rules in such cases."

Here the difficulty wholly disappears, because the fund is in the hands of the court, which can only donate it to a fraudulent claimant, confer it on a fraudulent debtor, or apply it faithfully according to the undenied agreement of the parties.

The court further said:

"In *Re Strand Music Hall Company*, (*3 de G., J. & S. 147*), the question arose whether that company had created a valid charge on their real property. '*There can, I think*,' said Lord Justice Turner, '*be no doubt that it was intended by these agreements to create a charge upon the property of the company*, but it was said on the part of the official liquidator that this intention was not carried into effect. I apprehend, however, that where this court is satisfied that it was *intended* to create a charge, and that the parties who *intended* to create it had the *power* to do so, *it will give effect to the intention*, notwithstanding any mistake which may have occurred in the attempt to effect it.'

"The doctrine is thus stated by Mr. Justice Story in his Equity Jurisprudence, Vol. II, sec. 1231: 'Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate, but on personal property, OR ON MONEY in the hands of a third person, a receiver, for instance, *wherever that is a matter of agreement*, at least against the *party himself*, and third persons who are *volunteers* or have notice; for it is a general principle in equity that as against *the party himself*, and any claiming under him *voluntarily*, or with notice, such an agreement raises a trust.' The author cites, in support of these views, *Legard v. Hodges, supra.*

"So, also, in *Pinch v. Anthony and others, 8 Allen (Mass.), 536*: 'It is well stated that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only *against the party who stipulated to give it*, but also against third persons who are either *volunteers*, or who take the estate on which the lien is agreed to be given, with notice of the stipulation. *Such agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be compelled in equity to fulfill it.*' * * * An agreement of a company to set apart specific earnings or property in the hands of a third person to meet the interest or principal of its bonds, creates an equitable lien or charge."

There are some minor differences between the Ketchum case and that now before the court:

First—In the former case the agreement was based on a statute; but the statute only authorized the parties to agree on the terms proposed, and when they accepted its terms the statute could only be referred to as showing to what extent the parties had bound themselves, and not as a positive law otherwise defining their rights. In that case the court endeavored only to find out what the parties had *intended*. In this case that duty is easily performed. The *intention* of the parties cannot be the subject of a doubt. No more is it a matter for censure or disfavor. It is simply a question of common honesty, and of the performance of a plain contract, based

upon a proper consideration. To hear it said now that this court will not enforce this contract, or rather that it will ignore and cancel one of its most important and indubitable provisions, is suggestive of the inquiry as to whether citizens who are *sui juris* are to make their own contracts, or whether these are to be made by the courts after the fact. Of course the power to modify a contract by the courts necessarily includes the power to destroy it; and when the courts have maimed and emasculated the agreement of the parties so that they would no longer recognize it, it would often be an act of heavenly mercy and charity to put an end to it.

Second--In the Ketchum case the income alone was pledged; in this case, the property of the railway is pledged *and* its income. This difference is of course unimportant; for in both cases the income was made the subject of a specific agreement.

Third—In the Ketchum case only a part of the income was pledged. In this, the whole income is assigned.

Fourth—It does not, indeed, appear that in the Ketchum case the railway company had the hardihood to come into court and to there ask for a nullification of its own agreement; but the objection was made by its mortgagee or assignee, who could certainly make it with no less force and in a more gracious manner.

These differences are all unimportant considerations, in no wise affecting the principle involved, which is no less than the principle of the validity and sanctity of private contracts, than which none can be more vital. Whoever trifles with

that principle commits himself to a line of conduct which is fraught with the greatest of evils.

What, after all, does the railroad company complain of? In no way does it show that it has been damaged by the decree below. It admits its insolvency. The money has gone to pay its honest debts. Where else should it go?

A sufficient answer to its complaints is made in *Pacific R. R. v. Ketchum, 101 U. S., 297,* where the court, speaking by the chief justice, said:

"All these were matters about which the parties might properly agree; and having agreed, it does not lie with them to complain of what the court has done to give effect to their agreement."

Undoubtedly the income "is as much a part of the mortgaged premises as are the rails or the cross-ties of the road," as was said by Mr. Justice Bradley, in *N. C. R. R. Co. v. Drew, 3 Wood's C. C. R., 712.*

Let us examine the terms of the mortgage. It conveyed all the property of the company, including "incomes, rents, issues, tolls, profits, receipts, rights, benefits and advantages had, received or derived by the party of the first part from any of the hereby conveyed premises." The modifying clause is as follows: "That so long as the party of the first part shall not make default in the payment of principal or interest of said bonds, it shall *retain the possession* of all the property hereby conveyed, and receive and enjoy the income thereof."

The rule as to the mortgage of income, or any other after-acquired property, and its effects, at least as between the par-

ties, is well settled in Arkansas, and is a rule of property. Thus the supreme court of that State say:

"Equity treats a mortgage of property to be afterwards acquired as a contract, binding in conscience to execute a mortgage upon it at the very instant it comes into being, and will enforce specific performance. It does more; it considers it as already done if no specific performance be requested; and then, by virtue of the equitable doctrine of notice, binds everybody to respect the equitable lien who knows of it; or, without knowing of it, has got the property without valuable consideration."

Little Rock Ry. Co. v. Page, 35 Ark., 304.

S. C., 7 Am. and Eng. R. R. Cases, 36.

Speaking of the fund derived from operating the railway, this court in *Fosdick v. Schall, 99 U. S., 255,* say:

"*Prima facie* that fund belongs to the mortgage creditors; and the presumption which thus arises has not been overcome."

The court in the same case, also use the following language:

"Every railroad mortgagee in accepting his security impliedly agrees that *the current debts* made in the ordinary course of business shall be paid from the *current receipts* before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, *until possession of the mortgaged premises is actually taken or some-*

thing equivalent done, the whole earnings belong to the company and are subject to its control."

This agreement the mortgagees have fulfilled to the letter. If it had been shown or could be shown that anything was "due from the earnings to the current debt," they would have consented to its payment; but it was not suggested that a cent was due on that account, or on any other account save the Sage claim.

Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income.

Fosdick v. Schall, ubi sup.

But certainly he does not impliedly agree that the mortgagor shall have the income when no such debts exist. If such had been the intention the clause as to the income would have been omitted.

In *Hale v. Frost, 99 U. S., 389*, it is held that "net earnings, while the road is in possession of a receiver appointed by the court, may be applied to the payment of claims having superior equities to that of the bondholders."

But it has never been held that the mortgagor has a "superior equity" to have the fund turned over to it for distribution among its stockholders. What other purpose can the company have save to distribute the money among its officers or its stockholders? The receiver had paid the operating expenses out of the current earnings, and there was not a

suggestion of any other debt save those of the bondholders, and the pretended debt of Sage.

In *Fosdick v. Schall*, and other like cases, the inquiry would have been greatly simplified if the court had announced that the company was entitled to the fund in the hands of the receiver, at all events, and that consequently it could pay any claimant at will, or could keep it without giving any account of its destination.

Before any part of the fund in question had been derived from the property, possession had been actually taken of it by the court for the use of whom it might concern, and as thenceforth the company was relieved of the care, expense and responsibility of operating the road, it could have no possible claim on the income.

So in *Gilman v. Ill. and Miss. Tel. Co., 91 U. S., 617*, the court said:

"It is clearly implied in these mortgages that the railroad company should *hold possession*, and receive the earnings until the mortgagees should take possession, *or the proper judicial authority should interpose*."

Therefore when the company ceased to *hold possession* its claim on the fund was gone. For the company's claim on the income was based on the consideration that it was engaged in operating the road, and needed or might need the income in paying the operating expenses; and by the express terms of the contract the company in this case limited its right to the income to the period during which it should "*retain the possession*." Nothing possibly could be more explicit.

The case of the *American Bridge Co. v. Heidelbach, 94*

U. S., 798, is relied on also for the appellant. But it is not in point; for in that case, as well as in the others, the fund was created while the property was in the actual custody of the mortgagor; and the contest was not been between the mortgagor and the mortgagee, but between the latter and attaching creditors.

In this cause there was no interposition on the part of any creditor except Sage, the trustees, and some of the bondholders represented by them, though the suit was pending in the court below for more than two years. We must, therefore, conclude that there are no other creditors who could have any claim, or pretense of claim, on the fund. The maxim of the law declares that those things are presumed not to exist whose existence is not made apparent.

But the exact point now before the court was decided, as we understand it, in the very late case of *Hitz v. Jenks, 8 Supreme Court Reporter, 143*. In that case Mrs. Hitz claimed that she had not executed the deed of trust by which she, as a married woman, had conveyed the lands in question; and she prayed that it might be cancelled. A receiver was appointed, pending the suit, by the consent of her husband but not by hers. The suit having been decided against her, she claimed the rents that had aceumulated in the hands of the receiver prior to the decree. On this point the court, speaking by Mr. Justice Gray, said:

"It is argued for the appellant that, by the rule affirmed in *Teal v. Walker, 111 U. S., 242*, a mortgagee is not entitled to rents and profits until he has been lawfully put in possession of the land; and that Keyser having been admitted into possession by Hitz only, cannot hold the rents and profits against Mrs. Hitz. *The conclusive answer to this argument is*

that the accruing rents were not received and held by Keyser by virtue of an agreement with Hitz; but the court, through Keyser as its receiver, took possession of these rents in order to preserve them for the party who should ultimately prevail in the suit. When it was afterwards adjudged that the first deed of trust, and the debt thereby secured, which Keyser's original bill sought to enforce, had been released and discharged, and that the second deed of trust was valid as against Mrs. Hitz, and the sum obtained for the land at a sale under the power contained in this deed proved insufficient, by more than the whole of the fund in court, to pay the debt of Hitz to Jenks secured by this deed, it was rightly held that Mrs. Hitz had no right as against Jenks to any part of this fund."

Respectfully,

U. M. ROSE.